TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 370.

JOHN T. BOSKE, SHERIFF OF KENTON COUNTY, KENTUCKY, APPELLANT,

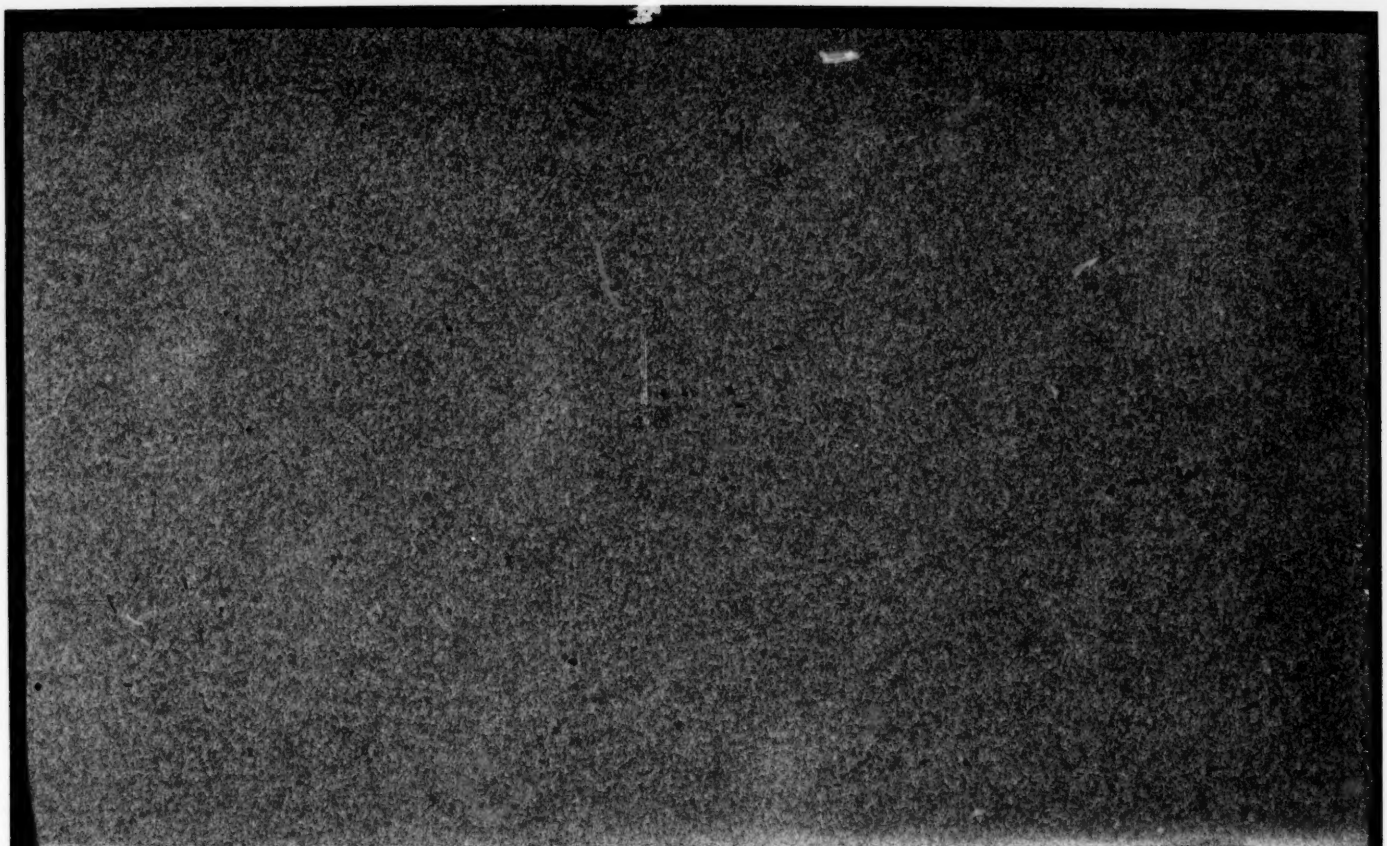
vs.

DAVID N. COMINGORE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 8, 1899.

(17,484.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 23, 1899.

1 Proceedings of the district court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 20th, A. D. 1899.

Present: Hon. Walter Evans, U. S. district judge.

In re DAVID N. COMINGORE, *Ex Parte.*

Be it remembered that heretofore, to wit, on the 28th day of June, A. D. 1899, came the petitioner herein, David N. Comingore, by R. D. Hill, his attorney, and filed his petition and exhibits herein, and on his motion it is ordered that a writ of *habeas corpus* do issue forthwith directed to the sheriff of Kenton county.

The petition above referred to is as follows:

To the Hon. Walter Evans, judge of the United States district court within and for the district of Kentucky:

Your petitioner, D. N. Comingore, respectfully says that he is a citizen of Kenton county, Kentucky, and that he is now unlawfully and unjustly detained and imprisoned by John T. Boske, sheriff of Kenton county, Kentucky, by virtue of an order of the Carroll county *county*, in the State of Kentucky; he further says that on March 1st, 1899, his deposition was, pursuant to notice, taken at his office, in the city of Covington, Kenton county, Kentucky, by and before W. A. Price, a duly appointed, qualified, and acting notary public within and for Kenton county, Kentucky, to be read as evidence in behalf of the plaintiff in the case of The Commonwealth of Kentucky, plaintiff, against Elias Block & Sons, defendants,
2 pending in said Carroll county court. Your petitioner further states that when his said deposition was taken he was and still is collector of the United States internal revenue for the sixth collection district in the State of Kentucky, and the said Block & Sons were then and since October 11th, 1885, had been and still are distillers and manufacturers of whisky in said district, and during said time had and still have a bonded warehouse at their distillery, which, during said time, has been and is located in Carroll county, Kentucky, in which all whisky manufactured by them during said time had been warehoused, and at the time said deposition was taken the warehouse had in it all whisky that had been manufactured by said Block & Sons that had not theretofore been withdrawn by them for consumption; that the said case of The Commonwealth of Kentucky against Block & Sons was and is a proceeding that was instituted in said Carroll county court at the instance of and by the Kentucky State revenue agent within and for Carroll county, Kentucky, under and by virtue of section 4241 of Kentucky Statutes, for the purpose, among other things, of ascertaining the exact amount and value of whisky that said Block & Sons had in said warehouse subject to taxation by and under the laws of Kentucky for each of the years from October 1st, 1885, to July 1st, 1897, in order that it might be

determined whether said Block & Sons had, during said time, listed all of said whisky with the State assessor of said Carroll county for State and county taxation; and, if not, that they might now be charged with and forced to pay to said State and county any and all taxes on so much of said whisky as has not theretofore been listed for taxation; that your petitioner was duly sworn before giving his said deposition, and, after being sworn, the following questions, among others, were propounded to him by the counsel for the plaintiff in said case, to each of which he made the answers just following each question:

3 "3. Did the defendants, Block & Sons, owners of said distillery, make, under the provisions of the laws of the United States, reports to your office as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on said distillery premises from the year 1887 down to the present time? If so, how often under the provisions of the law do they make such reports?

"A. They make reports monthly.

"4. Did they, under the provisions of said law, also make applications to your office during said time for permission to withdraw such liquors from bond? If so, how often?

"A. They make applications whenever withdrawals are made; daily if they choose.

"5. Are these reports of deposits and requests for privilege to withdraw, or official records made therefrom, now in your office, or under your control in any way, for the period commencing October 1, 1885, and ending July 1st, 1897?

"A. They are on the files of this office, but not under my control, except as collector.

"6. Please file official copies of them and make them a part of your deposition.

"A. I will have to decline to do this under sec. 3167 of the Revised Statutes of the United States and the rulings of the department.

"7. What rulings of the department do you refer to other than sec. 3167 of the Statutes?

"A. The ruling of the department is as follows:

"'The department does not permit the giving out of anything contained in internal-revenue returns or documents by a collector, storekeeper, or any other officer of a collection district for purposes other than those which the Statutes of the United States contemplate.'

"8. Who made that ruling of the department?

"A. It is made by the Secretary of the Treasury, through the Internal Revenue Commissioner."

Your petitioner further states that at the time said questions were propounded to and answered by him and at the time he refused to file as part of his deposition copies of the papers mentioned in said question "5" there was on file in his office at Covington, Kentucky, all of said papers, but they were and are public documents in his possession as said collector and owned by the United States, and

that he as an individual had no possession or control over them or any of them, and that he refused to file copies of same as part of his deposition under and by virtue of a regulation that was made and issued by the Secretary of the Treasury and Commissioner of Internal Revenue, of date August 3rd, 1896, copy of which is filed herewith as part hereof, marked "A." Your petitioner further states that when he refused to file and make a part of his deposition the official copies of the reports made to his office by Block &
4 Sons as to the amount of liquor which they manufactured and deposited in bonded warehouses located on their distillery premises, or copies of the official records made therefrom, for the period commencing October 1st, 1885, and ending July 1st, 1897, and official copies of requests for privilege to withdraw such liquor from bond, or copies of the official records made therefrom, for the same period referred to in question "5" of the aforesaid deposition, for the reasons stated in the answers to said questions "5" and "6" and subsequent answers in said deposition, he was, by the said W. A. Price, notary public aforesaid, adjudged to be in contempt of court and of said notary public for his said failure and refusal to file said copies and make them a part of his deposition; and it was further adjudged by the said W. A. Pri , notary public aforesaid, that the Commonwealth of Kentucky then and there recover of your petitioner the sum of five dollars ($5.00) as a fine, and that your petitioner be taken by the sheriff of Kenton county and confined in the jail of said county for the space of six hours, or until he was willing to furnish said copies or permit access to the records of his office in order that information might be obtained to be used as evidence in said case. He further says that the action of said Price, notary public aforesaid, and the reason therefor in adjudging your petitioner to be in contempt of court on account of his failure and refusal aforesaid to pay said fine, and to be confined in jail as aforesaid, was by said W. A. Price, notary public, as aforesaid, reported to said Carroll county court, as provided by section 538, Kentucky Civil Code of Practice, and the said Carroll county court, on the 3rd day of April, 1899, by order duly made and entered, approved the judgment and action of said Price, and your petitioner was by said county court, for his failure and refusal to file said copies and make them a part of his deposition, as aforesaid, adjudged to be in contempt of said court, and to pay a fine of five dollars, and was ordered by said court to be committed for contempt, copy of which order is filed herewith as part hereof, marked "B."

5 Your petitioner further states that after said order was entered in and by said county court, to wit, on June 27, 1899, the attorney for the plaintiff in said county court case and the said notary public, W. A. Price, appeared at his, the collector's, office in Covington, Kentucky, and thereupon and in pursuance to said order of the said county court the said attorney, in the presence of the said Price, notary public, propounded to your petitioner the following question:

"I call your attention to the opinion of the court rendered April 3rd, 1899, copy of which has been furnished you and as to which

you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as show the amount of liquor on hand at the warehouses of the defendants on their distillery premises in Carroll county, Ky., on September 15, 1890, Sept. 15, 1891, Nov. 15, 1892, Sept. 15, 1893, Sept. 15, 1894, and Sept. 15, 1895, and Sept. 15, 1896, or allow us on behalf of the plaintiff in this action access to and inspection of such records or papers for the purposes of taking copies for use on behalf of the plaintiff as evidence in this action."

To which question your petitioner made the following answer:

Answer. "I will have to decline, just as I did in the other case, and for the same reason as given in the other case."

And thereupon your petitioner was by said notary public, W. A. Price, again adjudged to be in contempt of said county court and said officer, W. A. Price, and it was adjudged by said Price that the Commonwealth of Kentucky recover of your petitioner the sum of five dollars as a fine, and that he be taken by the sheriff or some constable of Kenton county and confined in the jail of said county for the space of six hours or until he shall signify his willingness to purge himself of the said contempt and testify and give
6 the information from the records and documents under his control and in his custody as collector of internal revenue of the United States for the sixth district of Kentucky or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of The Commonwealth of Kentucky *vs.* L. T. Block *et al.* in said county court, and the said W. A. Price then and there issued and delivered to the said John T. Boske, sheriff of Kenton county, Ky., a written order of commitment, which is filed herewith as part her-of, marked "C;" and thereupon the sheriff arrested your petitioner and your petitioner is now in the custody of said sheriff, and he is unlawfully detained, imprisoned, and deprived of his liberty under and upon the judgment of the aforesaid Carroll county court in said case and under and by virtue of said order of commitment issued by said W. A. Price, N. P. Your petitioner further states that the records of deposits of liquor in bond and requests to withdraw liquor from bond and official records made therefrom from the period commencing October 1, 1895, and ending July 1, 1897, were privileged, and for that reason and because of the said regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue made conformably to law he could not legally and he ought not to be required to testify as to the contents of the said record or to file official copies of same or to permit access to same.

Wherefore, to be relieved and discharged of said unlawful detention and imprisonment, your petitioner prays for writ of *habeas corpus*, to be directed to John T. Boske, sheriff of Kenton county, Kentucky, to be issued in this behalf, so that your petitioner may be brought before this honorable court, to do and to submit and to receive what the law may direct.

DAVID N. COMINGORE.

Subscribed and sworn to before me this 27th day of June, 1899.

JOS. C. FINNELL,
Clerk U. S. Courts,
By L. M. VAN DYKE, *D. C.*

7 EXHIBIT "A."

Regular April Term, April Third, 1899.

Carroll County Court, District of Kentucky.

COMMONWEALTH OF KENTUCKY, Plaintiffs,
vs.
ELIAS BLOCK & SONS, Defendants.

Opinion and Judgment on Rule.

Without undertaking to recite all the facts preliminary to and leading up to this motion for a rule against D. N. Comingore, collector of internal revenue of the sixth district of Kentucky, it is deemed sufficient to state that this proceeding was pending to enforce the proper assessment and payment of State and county taxes on a large amount of whisky belonging to the defendants in their bonded warehouses at Prestonville, in this county, under the revenue laws of the State, and which it is claimed by the plaintiff the defendants had failed to assess or pay taxes on. The plaintiff claims that about the only legal proof touching the amount of whisky which defendants had on hand at the dates and time mentioned in its statement are certain applications, reports, etc., made by defendants and reports made by U. S. storekeepers or other U. S. officials in charge of the bonded warehouses and liquors stored therein, which reports, &c., are now in the possession of the said Comingore, as U. S. internal-revenue collector of the 6th district of Kentucky, at Covington, and on the 1st day of March, 1899, it proceeded to take his deposition to be read as evidence in this proceeding, and during the taking of said deposition the witness Comingore was asked by plaintiff's counsel to file official copies of certain reports of the defendants Block and Sons made to said collector's office "as to the amount of liquor which they manufactured and deposited in the bonded warehouses" on the distilling premises at Pres-
8 tonville, Carroll county, Ky., "from the year 1887 down to the present time," and also copies of certain "application made to your (his) office during said time for permission to withdraw such liquors from bond," which reports and applications the witness admits "are on the files" of the collector's office and under his control as collector; but he refuses to furnish said copies for the reason that he is not allowed to do so "under sec. 3167 of the Revised Statutes of the United States and the rulings of the department."

The notary, before whom the depositions were being taken, ruled that the witness by refusing to answer and furnish said copies was

in contempt, and adjudged that he be fined and imprisoned until he signified a willingness to comply with the request and file copies of said papers, and he certified his rulings to this court for such action as it might deem proper in the premises.

No response other than an oral response is made by or for the witness in this court and no defense offered except such as is claimed by him in answer to the questions propounded to him in the deposition—that is, that he declines to answer or furnish copies of the papers desired, (1) under sec. 3167 of the Revised Statutes, and (2) under the rulings of the department. In the hearing before this court it was not contended that there was any express statute of the United States that exempted the witness from giving the information or testimony desired, but that there was a regulation of the Treasury Department which forbids collectors of internal revenue from "the giving out of anything contained in internal-revenue returns or documents by a collector, storekeeper, or any other officer of a collection district for purposes other than those which the statutes of the United States contemplate," and that this rule or regulation of the department has the force and effect of a general law, not only to those under the control and direction of the department, but to all persons, and places such papers beyond the reach of the courts as testimony in any civil or criminal case or proceeding. Two cases are cited by counsel for respondent in support of this contention, *In re* Huttman, 70 Fed. Rep, 699, and *In re*
9 Weeks, 82 Fed. Rep., 730, and these cases are very persuasive of their views of the question and lean strongly in the direction, if they do not hold, that a rule or regulation of any department of the General Government has the force of an act of Congress. This seems to me to be an extreme view of the authority of the General Government in any of its departments and an invasion by the executive branch of the Government upon the rights and privileges and jurisdiction of the judicial.

On the other hand, we have the case of *In re* Hirsch, 74 Fed. Rep., 928, in which a question very similar, if not identical, with the one at bar before this court for adjudication was passed upon, and — learned judge in his opinion in reference to such a regulation says, "While they are entitled to respectful consideration, they neither authoritatively declare general principles nor establish general rules in regard to the subject of obedience to the orders of a court in the matter of evidence," and that they "have the force of a statute" only "in regard to the assessment of the internal revenue." In the case of Flemming *vs.* Stahl, 83 Fed. Rep., 943, in commenting upon the authority of the President and Civil Service Commission to make rules or regulations, the learned judge reaches the conclusion that "the President may make rules and regulations administrative in their nature, which would govern the policy of his administration," * * * but they "could not have the force and effect of law, nor would the courts enforce them."

After a careful reading of these several cases and an examination of such other authorities as were at hand, I am unable to conclude that in a Government such as ours, as intimately connected and re-

lated as the several States and the General Government are and ought to be, and the mutual interest subsisting between them in regard to the faithful and proper enforcement of all the laws of each, which are consistent with their respective constitutions, it could be the purpose of either to deliberately by its policy or legislation or regulations to thwart, impede, or hinder the due execution of the laws of the other. The State has as much right as the Gen-
10 eral Government to collect the revenue due it. It is not denied that the General Government has the same right to collect its revenue; but has it the right in doing so to step in through its officials between the State and its tax-payers and say you shall not have access to the property itself to list it for taxation, nor shall you, through the courts or otherwise, have the right to the records in the U. S. revenue office as evidence to establish the amount of property owned by a tax-payer and liable to State taxation?

On the rule before me in relation to the contempt, I therefore enter the following as the judgment of the court:

It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the sixth district of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 15th day of Sept., 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892; it is further ordered that the witness, D. N. Comingore, make or cause to be made or permit the plaintiff, its agent or attorneys, to make true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agents or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky.

It is further adjudged that the action of the notary public,
11 Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents, and exemplifications or to testify as to their contents, as requested, be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of five dollars as a fine, and that he be taken by the sheriff of Kenton county, Kentucky, and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows:

Please file official copies of the reports made to your office by Block & Son as to the amount of liquor which they manufactured

and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond.

Also with the following request:

Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll county on September 15th, 1890, Sept. 15th, 1891, Nov. 15, 1892, Sept. 15, 1893, 1894, 1895, and 1896.

To all of which the defendants except.

The clerk of the court is ordered and directed to make out attested copies of this judgment and order and forward same to the sheriff of Kenton county, Ky., and W. A. Price, notary public, as warrant and authority for the enforcement thereof, to which the defendants also except.

A copy.

Attest:

A. J. BRUCE, *Clerk*,
By W. DEATHERAGE, *D. C.*

12 EXHIBIT "B."

Series 7, No. 12. Revised August 3, 1896. Supplement No. 1.

Regulations prohibiting the giving out by collectors of records in their offices or copies thereof for purposes not contemplated by the internal-revenue laws.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *April* 15, 1898.

The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the regulations, series 7, No. 12, revised August 3, 1896:

All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose.

Collectors are hereby prohibited from giving out any special-tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a State court, whether in answer to *subpœnas duces tecum* or otherwise.

Whenever such subpœna shall have been served upon them they will appear in court in answer thereto and respectfully decline to produce the records called for on the ground of being prohibited therefrom by the regulations of this department.

The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States, and there is no provision of law authorizing the sending out

of these records or of any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not
13 to be permitted.

As to any other records that those relating to special-tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely:

In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of the court upon the Secretary of the Treasury requesting the same.

Whenever such rule of court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whether upon it will be transmitted to the Secretary of the Treasury, with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it unless it should be found that circumstances or conditions exist which make it necessary to decline in the interest of the public service to furnish such a copy.

N. B. SCOTT,
Commissioner.

Approved:
L. J. GAGE,
Secretary of the Treasury.

14 EXHIBIT "C."

The Commonwealth of Kentucky to the sheriff or any constable of Kenton county:

D. N. Comingore, being examined as a witness by deposition before me, as a notary public, for the purpose of using his testimony on the trial of a certain action pending in the Carroll county court, in which The Commonwealth of Kentucky is plaintiff and Louis T. Block *et al.* are defendants, and having been adjudged guilty of contempt of said court in refusing to answer certain questions then asked him and to give information as to the amount of distilled liquors in the custody of the defendants in said action at certain times, as shown from the records, documents, and reports on file in his office and under his control as collector of internal revenue for the United States for the sixth district of Kentucky, or to allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action, as shown by certified copies of the order and judgment of said court hereto attached as

part hereof, as well as the action had and recorded by me in the taking of said depositions:

These are therefore to command you to take the body of the said D. N. Comingore and him safely keep or confine him in the jail of Kenton county for the space of six hours and until he shall satisfy the Commonwealth of Kentucky the sum of $5.00 adjudged against him for contempt or until he shall signify his willingness to purge himself of the said contempt and testify and give information from the records and documents under his control and in his custody as collector, as aforesaid, and how you shall have executed this writ you will make known to me at my office, in Covington, Ky., or the judge of the Carroll county court, at his office, at Carrollton, Carroll county, Ky., and with such return produce this writ.

Witness my hand and seal of office as notary public for Kenton county, Kentucky, this 27th day of June, 1899.

[SEAL.] W. A. PRICE, *N. P., Ky.*

My commission expires Jan'y 25, 1900.

15 The writ of *habeas corpus* above referred to is as follows:

The President of the United States of America to the sheriff of Kenton county, Greeting:

You are hereby commanded to produce forthwith the body of David N. Comingore before the judge of the district court of the United States for the Kentucky district, at Louisville, illegally detained by you, as alleged, together with the nature and cause of his detention, then and there to abide by such order as shall be made in the premises, and have then and there this writ; and this you shall in nowise omit, under the penalty in such case denounced.

[SEAL.] Witness the Honorable Walter Evans, judge of the district court of the United States, at Louisville, in said district, this 28th day of June, 1899, and of the Independence of the United States the 123rd.

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

Upon which the marshal made the following return:

I hereby certify that I received this writ on the 28th day of June, 1899, and that I have personally executed the same by delivering a true copy of this writ to John Boske, sheriff of Kenton county, Ky., on the 28th day of June, 1899. This therefore returned executed as the law directs this 30th day of June, 1899.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *Deputy.*

16 And on the 5th day of July, 1899, the respondent, John T. Boske, made his return in writing to the writ of *habeas corpus* herein. He also produced in court the body of the relator.

And thereupon the relator, by R. D. Hill, his counsel, moved the court for judgment of discharge upon the writ and the return thereof;

to which the respondent, by H. M. Winslow, his counsel, objected; and the matters of law arising on said motion having been argued by said counsel, and the court, being fully advised thereof, delivered a written opinion, which is ordered to be filed and made a part of the record, and in accordance therewith it seems to the court the law is for the relator.

It is further considered by the court that the imprisonment and detention of the relator by the respondent is in violation of the Constitution and laws of the United States. It is therefore ordered that the relator be discharged of the premises, and that he go hence without day.

It is further considered by the court that the said David N. Comingore, the relator, recover of the said John T. Boske, the respondent, his costs in and about this writ herein expended.

On motion of John T. Boske, the respondent, by his counsel, it is ordered that he do have until and including July 8th, 1899, to prepare and file a bill of exceptions herein.

17 The return of John T. Boske, above referred to, is as follows:

To the Hon. Walter Evans, judge of the United States district court within and for the district of Kentucky:

In the Matter of D. N. COMINGORE on Proceedings for *Habeas Corpus.*

The undersigned, John T. Boske, sheriff of Kenton county, Ky., for response and return to the writ of *habeas corpus* served on him herein, says he has in his custody the said D. N. Comingore, whom he brings before your honor as directed by the writ, and for the cause and time of his detention and imprisonment says that under warrant of commitment from W. A Price, as notary public for Kenton county, Ky., of date June 27th, 1899, and under order and judgment of the Carroll county court attached thereto, and copies of which are hereto attached, he, on June 27th, 1899, took said Comingore into his custody for contempt of the Carroll county court and of said W. A. Price, as notary public for Kenton county, Ky., while engaged in taking the deposition of said Comingore, to be read as evidence in an action pending in the Carroll county court styled Commonwealth of Kentucky, &c., *vs.* L. T. Block, &c.

Respondent says that on June 27th, 1899, additional proceedings to these set forth in the petition herein were taken before said Price, as follows:

Having resumed the foregoing deposition of D. N. Comingore, the taking of which was commenced before me on March 1st, 1899, and the notice attached hereto for the continuance thereof on this the 27th day of June, 1899, and a copy of the order of the Carroll county court in the same matter of date April 3rd, 1899, the taking of said deposition is now resumed under said notice and order of court at the same time and place and for the same purpose as stated in the original caption.

(Signed) W. A. PRICE,
N. P., Kenton Co., Ky.

18 By ATTORNEY FOR PLAINTIFF:

Q. 23. I call your attention to the opinion of the court rendered April 3rd, 1899, copy of which has been furnished you and as to which you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as shown the amount of liquors on hand at the warehouses of the defendants on their distillery premises in Carroll county, Ky., on Sept. 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893; Sept. 15th, 1894; Sept. 15th, 1895; Sept. 15th, 1896, or allow us on behalf of the plaintiff in this action access to and inspection of such records or papers for the purpose of taking copies for use on behalf of the plaintiff as evidence in this action.

Ans. I will have to decline just as I did in the other case and for the same reason as given in the other case.

Q. 24. Please examine the records and reports under your control and in your custody as collector and state what amount of liquors were contained in the warehouses owned by the defendants in Carroll county on the following dates: Sept. 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893; Sept. 15th, 1894; Sept. 15th, 1895, and Sept. 15th, 1896.

Ans. I decline to answer for the same reasons as stated before.

The witness, D. N. Comingore, declining and refusing to testify and answer the questions or allow the taking of the information from the records of his office, and the Carroll county court having, upon report to him of the matter under the taking on the 1st day of March, 1899, decided and adjudged such refusal to be contempt of said court, of which the said witness has due information, he is now again adjudged in contempt of said court and that the Commonwealth of Kentucky recover of him the sum of five dollars as fine, and that he be taken by the sheriff or some constable of Kenton county and confined in the jail of said county for the

19 space of six hours or *or* until he shall signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as collector of internal revenue for the United States for the sixth district of Kentucky, or allow the inspection of his records for the purpose of obtaining such information for use as evidence in the action wherein The Commonwealth of Kentucky is plaintiff and Louis T. Block *et al.* are defendants, pending in the Carroll county court, and pending such further proceedings as may be taken in the matter and subject to the reopening of the deposition for the purpose of the completion thereof, he is requested and required to sign the same.

(Signed) W. A. PRICE,
Notary Public, Kenton Co., Ky.
D. N. COMINGORE.

Upon the conclusion of which proceedings, by directions of said Price, as notary public, under the said warrant of commitment and

judgment of said Carroll county court, he took said Comingore into custody for contempt of said court, and so holds him in custody.

Respondent respectfully begs to further show and states that during the progress of said action, in order to conform to any reasonable rules and regulations of the executive department of the United States as to mode and manner of reaching said evidence and conform- thereto for the convenience of the officers thereof, the plaintiff in said proceeding, by its attorneys representing it therein, wrote to Hon. Lyman J. Gage a letter, of date Aug. 2nd, 1897, reading as follows:

CARROLLTON, KY., *Aug. 2nd*, 1897.

"Hon. Lyman J. Gage, Secretary of the Treasury, Washington, D. C.

DEAR SIR: Please refer to your letter to us of date June 29th, 1897, your number 16005A/42 Ek, in reference to our obtaining certain information from the collector of internal revenue, to be used as evidence in the trial of an action wherein The State of Kentucky is plaintiff and certain distillers are defendants. The action is one in which the State is seeking to assess liquors in U. S. bonded warehouses, and which the defendants have failed, neglected, and refused to list for regular State and county taxation. The collector's office contains papers which will show absolutely the true amount of liquors on hand at the proper date for assessment, as well as other revelant evidence. Under our statute copies of these records or documents, duly attested and certified, are competent evidence.

We are not seeking information upon which to base a suit, but are seeking testimony. By referring to your file number, 15068A/40 EK, you will find a letter to your predecessor, Mr. Carlisle, written by us, and also a copy of his reply, dated December 17, 1896. We have filed an affidavit of the character referred to in the letter of Mr. Carlisle and asked for a rule to be awarded requesting you to furnish the desired information and evidence, consisting of copies of certain records and documents from the collector's office at Covington, Ky.

The motion for the rule is now pending, defendants' counsel objecting to its issuance, stating that the Secretary is not permitted to furnish such information under any circumstances. The court has taken time upon the matter until August 16th. We are proceeding strictly under rule XII of your department, and it seems to us we are clearly entitled to the desired evidence under that rule, and that was evidently the opinion of your predecessor, Mr. Carlisle. In our opinion the collector could not refuse to testify as a witness in this regularly instituted proceeding. It is true we are not pursuing the exact line mapped out in Mr. Carlisle's letter, for we have not summoned the collector to appear to testify, and he has not appeared 'with the United States attorney.' We have waived that part of the matter, not desiring to cause that trouble and expense, but we have filed the required affidavit.

It does seem to us that the United States Governement ought not to assist persons in defrauding the State government out of taxes

justly due it, but that it should be willing to assist a State in collecting its just dues, especially so when the agent of the United States carries the keys to the buildings in which the property sought to be taxed is located and no one can enter the building without his consent.

Is it not a fact that we are properly following rule XII of your department in this matter, and that you will furnish copies of the records or documents in said office to the court 'upon a rule of the court requesting the Secretary of the Treasury to furnish the same'?

If this is not the correct practice, can you inform us what is the correct practice to obtain this evidence from said office, or do you hold that such evidence cannot be obtained in any way? If such is your view, it is certainly contrary to that of Mr. Carlisle, as shown by his letter formerly referred to herein, a copy of which is doubtless on file in your office.

A reply at your early convenience will greatly oblige,

Yours very truly,

(Signed) WINSLOW & WINSLOW."

To which letter the said Gage made reply as follows:

"16005A
42 Ek.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *August* 13, 1897.

Messrs. Winslow & Winslow, attorneys-at-law, Carrollton, Kentucky.

GENTLEMEN: I have to acknowledge the receipt of your letter of the 2nd inst., in which you refer to a letter of my predecessor, dated December 17, 1896, in regard to furnishing certified copies of the records in this department.

21 Rule XII prescribes that when the parties to a suit desire copies of the records copies will be furnished to the court only upon a rule of the court requesting the Secretary to furnish the same. This is a general rule, to be applied within the discretion of the Secretary. It was not intended that the Secretary would furnish the copies in every case in which the application was made. Each application is considered when presented, and granted or refused as the circumstances may warrant.

In the Secretary's letter of December 17, 1896, this limitation is not stated, and you were probably led to the conclusion that after you procured the order of the court the copies requested would be furnished.

You seek information in the office of the collector of internal revenue 'which will show absolutely the true amount of liquors on hand at the date of assessment' for State taxes.

It has been the uniform practice of the department to decline to furnish information of this character from the records of the in-

ternal-revenue office, and I am not disposed to reverse the practice even upon a rule of court requesting it.

Respectfully yours,

(Signed) L. J. GAGE, *Secretary.*
L. J."

For which it is shown that the only resource left the plaintiff was the proceeding taken against the said Comingore requiring him to testify under the order of the said Carroll county court and said notary public.

Respondent says that sec. 3167 of Rev. Stat. of the United States has no application to the question in controversy, and that the Secretary of the Treasury and the Commissioner of Internal Revenue are executive and not legislative officers of the Government, and under the Constitution have no authority to make laws or any rules or regulations to have such effect, except upon their subordinates, with regard to their relations as officers with the Government, and that such must be made conformably to the law of the land upon the subject of evidence and cannot be of any force as between the States or the States and citizens or tax-payers to alter, change, or effect the law regularly accepted or adopted by the Government or enacted by the regular legislative authorities, nor are the facts sought to be elicited from the records and documents as evidence and pertinent to the issue involved in any sense "State secrets" or "privileged communications" in contemplation of law as heretofore adjudged by those appointed under authority to exercise judicial functions in this Government (*In re* Hirsch,
22 74 Fed. Rep., 928; Fed. Rep., 1005), and to sustain the witness and direct him to be discharged from custody would be to allow him, upon whom alone executive functions devolve in the discharge of the duties of his office, to be judge of the law as against the regular elected county judge of the State county court, and to uphold a law attempted to have been enacted by another merely executive officer of the Government, and thus both legislative and judicial functions be usurped by the executive officers; and respondent submits the question to your honor and the courts regularly appointed under the law of the United States for the exercise of judicial functions, and asks that the writ against him be discharged.

JOHN T. BOSKE,
Sheriff Kenton Co., Ky.

WINSLOW & WINSLOW,
Att'ys for Respondent.

Subscribed and sworn to before me as clerk of the Kenton circuit court this 1st day of July, 1899.

W. E. MILLER,
Clerk Kenton Cir. Ct.,
By H. S. BEMIFORDE,
D. C. Kenton Cir. Ct.

The copies referred to and attached to said return and made part thereof read the same as Exhibit- A and C, respectively, filed with the petition and heretofore copied in this transcript.

23 United States District Court, District of Kentucky.

In re DAVID N. COMINGORE, Petitioner.

Opinion.

The petitioner for the writ of *habeas corpus* in this case is the collector of internal revenue for the sixth district of Kentucky, duly appointed and commissioned by the President of the United States. Previous to March 1, 1899, the auditor's agent, claiming that Elias Block & Sons, distillers, had failed to list for State taxation certain distilled spirits in their warehouse in Carroll county, Kentucky, instituted civil proceedings against them in the name of the Commonwealth of Kentucky under the provisions of sec. 4241 of the Kentucky statutes to compel an assessment of the spirits for taxation. On that day the petitioner, in obedience to a subpœna, appeared as a witness to give his deposition in the case before W. A. Price, a notary public.

After being duly sworn he was asked several questions to which he made answers as follows:

"3. Did the defendants, Block & Sons, owners of said distillery, make, under the provisions of the laws of the United States, reports to your office as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on said distillery premises from the year 1887 down to the present time; if so, how often under the provisions of the law do they make such reports?

"A. They make reports monthly.

"4. Did they, under the provisions of said law, also make applications to your office during said time for permission to withdraw such liquors from bond; if so, how often?

"A. They make applications whenever withdrawals are made. Daily, if they chose.

"5. Are these reports of deposits and requests for privilege to withdraw, or official records made therefrom, now in your office or under your control in any way for the period commencing October 1, 1885, and ending July 1st, 1897?

"A. They are on the files of this office, but not under my control except as collector.

"6. Please file official copies of them and make them a part of your deposition.

"A. I will have to decline to do this, under sec. 3167 of the Revised Statutes of the United States and the rulings of the department.

24 "7. What rulings of the department do you refer to other than sec. 3167 of the statutes?

"A. The ruling of the department is as follows:

"'The department does not permit the giving out of anything contained in internal-revenue returns or documents by a collector,

storekeeper, or any other officer of a collection district for purposes other than those which the statutes of the United States contemplate.'

"8. Who made the ruling of the department?

"A. It is made by the Secretary of the Treasury through the Internal Revenue Commissioner."

For failing to answer some of the questions in the manner desired and for failing to furnish the official copies demanded the notary public then adjudged that the petitioner should pay a fine of $5.00 and be confined in the county jail for six hours, or until he was willing fully to answer the questions and furnish the copies.

This judgment of the notary public was *per se* ineffective under sec. 538 of the Kentucky Code of Practice, and had to be reported to the court in which the litigation is pending, the code requiring that the court shall render judgment for the fine imposed to the extent it is approved.

The notary reported this action to the county court, by which it was approved and judgment entered in the following form:

"It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the sixth district of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 15th day of Sept., 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892. It is further ordered that the witness, D. N. Comingore, make or cause to be made, or permit the plaintiff, its agent or attorneys, to make, true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agent or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky.

It is further adjudged that the action of the notary public, W. A. Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents, and exemplifications, or to testify as to their contents as requested be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of five dollars as a fine, and that he be taken by the sheriff of Kenton county, Kentucky, and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken as follows:

Please file official copies of the reports made to your office by

Block & Son as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond.

Also with the following request:

Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll county on September 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893, 1894, 1895, and 1896."

Afterwards, on June 27th, 1899, the said notary public and plaintiff's attorney appeared at petitioner's office to continue his deposition, and the following colloquy took place:

"I call your attention to the opinion of the court rendered April 3rd, 1899, copy of which has been furnished you and as to which you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as show the amount of liquor on hand at the warehouses of the defendants on their distillery premises in Carroll county, Ky., on September 15, 1890; Sept. 15, 1891; Nov. 15, 1892; Sept. 15, 1893; Sept. 15, 1894; Sept. 15, 1895, and Sept. 15, 1896, or allow us, on behalf of the plaintiffs in this action, access to and inspection of such records or papers for the purposes of taking copies for use on behalf of the plaintiff as evidence in this action?

"Answer. I will have to decline just as I did in the other case and for the same reason as given in the other case."

Q. 24. "Please examine the records and reports under your control and in your custody as collector and state what amount of liquors were contained in the warehouses owned by the defendants in Carroll county on the following dates: Sept. 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893; Sept. 15th, 1894; Sept. 15th, 1895, and Sept. 15th, 1896.

Answer. "I decline to answer for the same reasons as stated before."

Thereupon the notary public, and not the court nor the clerk thereof, issued an order for committing the petitioner to jail. The order was placed in the hands of the respondent, the sheriff of the county, who took the petitioner into custody, and the writ of *habeas corpus* was applied for and issued.

There is no dispute about the facts, though it may be doubted whether the petitioner's imprisonment was not wholly unauthorized upon the ground that the notary public had no power
26 under the Kentucky Code to issue the process under which the arrest was actually made (sections 535, 538, Civil Code). But the court will not pass upon that point, inasmuch as all parties desire that there shall be a judicial determination of the very important and interesting questions involved, namely: Was it the duty of the collector of internal revenue to answer the questions propounded, and to give the information or furnish the official copies demanded

of him, and has the State of Kentucky, as a litigant in a civil action in her own court, the right to exact it of that officer in such a case?

A question somewhat kindred to these has been passed upon by three different Federal courts. All of the cases, however, were different from this in two important particulars: First, that the information in each of them was desired in aid of the criminal laws of the States in regard to the occupation of retailing distilled spirits, as to which some of the facts are required to be made public by sec. 3240 of the Revised Statutes of the United States; and, second, the latest regulation bearing on the subject had not then been promulgated.

In the case of Hirsch, 74 Fed. Rep., 928, Circuit Judge Shipman, of Connecticut, in an elaborate opinion, held that the collector should be compelled to testify. His opinion seems even to go to the extent of holding that the Treasury Department has no authority of law for making a regulation that would prevent it. The learned judge, in aid of the State court proceeding, seems to have held that the spirit of sec. 3240 of the Revised Statutes required a construction that would compel internal-revenue officers to testify in all cases where information was sought by the State as to who were retail dealers in distilled spirits. If that be correct, it would seem to follow that the same liberality of construction would, on the other hand, require it to be held that the spirit of sec. 3167 forbids any collector to give the information demanded of the petitioner
27 in cases like this; and, indeed, the public policy of the United States might seem also to require this construction. That section prohibits the collector and other internal-revenue officers from disclosing certain information they acquire from visits to distilleries, &c.

In a somewhat earlier case, *In re* Huttman, 70 Fed. Rep., 701, Judge Williams, of the district of Arkansas, sitting by designation in Kansas, had expressed views exactly contrary to the Hirsch case, though this fact does not seem at that time to have come to the notice of Judge Shipman.

In the latest case, *In re* Weeks, 82 Fed. Rep., 729, Judge Wheeler, of the district of Vermont, held with Judge Williams that the collector was not required to answer.

This conflict of authority seems to make necessary, or at least appropriate, a further examination of the whole subject.

It should not be, and I think never is, the purpose or desire of the Federal tribunals to interfere with any of the legitimate functions of the State courts or officers. Indeed, the leaning will be in the other direction. Judicial proceedings, Federal and State, are essential to the good order of society and to the protection of the rights of the individual citizen. Those proceedings would often prove abortive if the courts had not the most extensive powers as well as full authority to compel witnesses to testify to facts within their knowledge, and indeed to produce papers under their individual control in proper cases. This general proposition is certainly true, notwithstanding there are many exceptions to it, notably such as pertain to privileged communications, incompetent testimony, testi-

mony that would tend to degrade the witness or subject him to criminal prosecution, and such as is forbidden by public policy.

In this case if the petitioner had been called to testify only as to facts within his personal knowledge no law would exempt
28 him from that duty if what he knew was competent testimony and its admission was not forbidden by other rules. It is not claimed that any of the information desired at his hands is within his personal knowledge. It is all contained in certain reports made to him by the distillers and by other United States officers and which are in his possession in his official capacity as an officer of the United States.

As it is clear that they are not his private property, it is essential to accurately ascertain the nature of those reports and his relations to them and his duties respecting them.

In order to obtain money for the support of the Government, Congress has passed laws for the collection of the revenue to be derived from internal sources. A complete system has been established. It is placed under the Treasury Department. The Secretary of the Treasury is its head. It is operated through the bureau of internal revenue, at the head of which is the Commissioner. The entire system is under his supervision, but subject to the control of the Secretary of the Treasury.

Section 3301, Revised Statutes, provides that every storekeeper shall on the first Monday of every month make a report to the collector of the quantity of distilled spirits in the warehouse in his charge, and section 3307 requires that the distiller shall monthly make and swear to a report substantially similar.

These reports thus made to the collector in the course of administering the laws of the United States, and for this executive purpose alone, are now demanded of him by the State officials in the manner before shown.

Under the law in the exceptional instance of a distiller the property of the citizen is arbitrarily laid hold of by the United States as soon as it is manufactured and is kept under its control until the tax is paid, possibly eight years afterwards. Meantime these reports must be made. So far as the information contained in
29 the reports is obtained from the distiller, it is extorted for the sole purpose of enabling the United States to ascertain and collect from him its revenues. This purpose is all that relieves both this act and that of so long holding his property from being mere tyranny. The information derived from these reports is not obtained for publication in any manner; it is entirely official. Under this state of fact it does not seem to the court that these reports are in any sense records open to the use of the public. They are the property of the United States in the custody of its officers. They were exacted for the sole purpose of collecting revenue. It is true that they are property of a peculiar character, but that does not alter the fact. Property is defined as being the exclusive right of control and dominion over a thing and may include anything that is subject to ownership. Public records and documents are such as are placed on the public files for the use or information of

the public, to which the public has access and of which the public has the right, usually upon payment of certain fees, to demand copies. They are not property in any ordinary sense. In many cases copies of the public records of the United States may be authenticated by the head of the department or other ultimate custodian. Familiar instances of such public records are those in judicial proceedings and where documents are required to be registered or recorded, patents for land, and many others. (See Boyden *vs.* Burke, 14 Howard, 575.)

But there is no statute or law of the United States which authorizes or permits the collector of internal revenue to make or to certify for use by any one else copies of the reports which have been gathered for particular governmental purposes.

The United States has not authorized the use of these executive documents by anybody for any purpose except the official one for which the reports were made. No statute is shown which
30 gives the litigant in this case any right to claim the use of this property—the private property of the United States—for any purpose whatever. The petitioner is the immediate custodian thereof under the control of his superior officers. They have forbidden him to put this property of the United States to the uses required by the litigant in the State court, and yet the petitioner is arrested for obeying the orders of his superior officers respecting private papers of the Government in which the State of Kentucky has no interest whatever and over which it has no more lawful control than it has over any other property of the United States. The purpose for which the litigant desires this property cannot affect the question of its right to it. It would not be contended that the State of Kentucky had any right to claim this property or its use except for the single quality it is supposed to have of silently testifying upon the issues involved in the case against Elias Block & Sons. No logic is perceived in the possible suggestion that that makes a difference in right, though it may make the use more desirable in fact.

The State, except so far as it may be given by statute, has no right over the property or the archives of the United States Government.

No statute is shown to justify the claim now made, though a statute is necessary to make the claim good. No sovereign can claim or obtain the right to demand the use of the archives or quasi-private documents of another sovereign without its consent expressly given, and public policy forbids that any attempt to extort such use should be encouraged. Most unseemly, not to say dangerous, consequences might otherwise ensue.

The State, while it may compel the petitioner as a mere individual to tell what he may know in that capacity, has no power to control him as an officer nor to regulate the conduct of his official duties with reference to these reports nor their contents, as those duties can only be fixed by the laws of the United States and the
31 orders and regulations of his superior officers.

Among the official duties thus prescribed for the petitioner

in the conduct of his office and respecting the care of the property of the United States committed to his custody is that which requires that he shall not do with it what is demanded at his hands in this case.

It may be assumed to be clear that a State statute cannot impose duties upon a Federal officer as such, much less can a State court do so. The attempt to do it in this case through the medium of a process of contempt must fail, because the State shows no statutory right thus to appropriate the property of the United States nor to impose a duty upon its officers. If it were otherwise and if the officers of the United States in the discharge of their duties could be interfered with by State courts or officers, it might soon produce a state of affairs that would be intolerable. It might, for example, take much of their time or put them to great expense. If the State courts could for this purpose appropriate this property or could compel official copies to be made or official information to be compiled, where would the line be drawn, and *vice versa*, if the Federal authorities or courts could interfere with the duties of State officers, except in those cases expressly authorized by the supreme law of the land, or necessary to carry into effect the laws of the United States or to enforce the judgments of her tribunals. There is no law of the United States which would give the Federal authorities power over the property of a State except occasionally through the writ of *ad quod damnum* and through the exercise of the right of eminent domain.

While these views are believed to be correct as to mere property as distinguished from true public records, as above defined, it probably might not be held that Federal courts, on the one hand, and State courts, upon the other, were incompetent to compel custodians of public records either to give copies lawfully demanded upon payment
32 of fees or else to attend with the records in proper cases under a *subpœna duces tecum*. But this would be upon the ground that they are records to which all the public has the right of access. The right, however, if held to exist, would not extend to another class of papers which the State might own and which pertained to the conduct of its government and which its policy has not opened to the public. For example, in the early case of Morris *vs.* Creel, 2 Virginia Cases, 49, it was held that a paper submitted to the executive council of Virginia for the purpose of enabling it to perform its executive functions ought not to be withdrawn by the clerk without the order of the council, and therefore no attachment should be awarded against the clerk for refusing to obey a *subpœna duces tecum* commanding him to produce the paper to be read in evidence.

Every paper in the custody of public officers is not a public record. Some, as in this case, may be mere papers belonging to the United States as documents pertaining to the administrative affairs of the United States and as mere property which the United States has obtained for its mere executive purposes and over which, through its proper agents and officers, it has exclusive control, and which the State cannot demand for purposes of testimony or otherwise,

contrary to regulations made under the authority of the Federal statutes.

It is altogether correct to say that neither the Secretary of the Treasury alone nor the Commissioner of Internal Revenue, with his approval, can make regulations having the force of law unless authorized to do so by congressional enactment, but it is also believed to be true that sections 161, 261, and 321 together are ample to authorize the making of the regulations hereinafter set forth. They contain provisions as follows:

By SEC. 161. "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

33 By sec. 261 it is provided: "The Secretary of the Treasury shall prescribe rules and regulations not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, and give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law;" and,

By sec. 321, that "the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties, and taxes now or hereafter imposed by any law providing internal revenue and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

At all events, the following regulations were made, namely:

"TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *April* 15, 1898.

The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the regulations, series 7, No. 12, revised August 3, 1896:

All records in the offices of collectors of internal revenue or any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose.

Collectors are hereby prohibited from giving out any special tax records or any copies thereof to private persons, or to local officers, or to produce such records or copies thereof in a State court, whether in answer to *subpœnas duces tecum* or otherwise.

Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department.

The information contained in the records relating to special-tax payers, in the collector's office, is furnished by these persons under

compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or any copies thereof for use against the special-tax payers in cases not arising under the laws of the United
34 States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted.

As to any other records than those relating to special-tax papers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely:

In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary of the Treasury requesting the same.

Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such copy.

N. B. SCOTT,
Commissioner.

Approved:
L. J. GAGE,
Secretary of the Treasury."

Now, as against persons desiring to use the property of the United States these statutes should be liberally construed to preserve that property, and no third person has any right to gainsay it. He has no interest in the property. At all events, it is believed that the statutes and regulations constitute a binding rule for collectors of internal revenue, in their control of the Government prop-
35 erty entrusted to their care, sufficient to justify them in rendering obedience to their chief, especially as against all outside persons, and also sufficient to excuse them for refusing to permit anybody to use or to get the benefit of that property who does not show some positive law of the United States as a basis of a demand for it.

Here the State of Kentucky is a litigant only in a civil suit, and it may well be supposed that the general principle that when a government abandons its sovereignty and becomes a private litigant it is subject to ordinary rules should have some application, but whether so or not the court is convinced that the State can

manifest no right to the papers asked for, except by means of some statutory enactment bestowing it or through some act of courtesy, as distinguished from a right, on the part of the lawful custodian.

It is an old rule that one government will not aid another in enforcing its revenue laws. Whether it should be applied to the operations of our State and national governments need not, in the abstract, be considered. Certain it is, however, that no law of the State can be found which is intended to aid the national Government in the collection of its revenue, nor can any be found in the statutes of the United States which was intended to assist the States. Whether comity would require such enactments on the part of both need not be considered. The fact remains that such legislation has not been regarded as at all needful or desirable. The United States has a complete revenue system of its own, and equally so has the State. They are and must necessarily be entirely independent of each other, though, in some respects, notably in the matter of taxing the occupation of a retail dealer in distilled spirits, the statutes of the United States make it plain that by taxing the occupation it is by no means meant to authorize such occupation contrary to local laws. It only intends to tax the occupation if it is in
36 fact carried on, but does not authorize it to be carried on.

This is the basis of the provisions of section 3240 as well as 3243 of the Revised Statutes, and it should not be overlooked that while, by the regulations above given, the Treasury officials undertake to control the use of the *the* reports referred to, they do not undertake altogether to deprive litigants of their use as testimony, except so far as the lawful custodian thereof regards it as incompatible with the public interest. While he has the right and the power altogether to exclude others from all use of such property, yet, under certain circumstances, as matter of courtesy, copies of the papers will be furnished. Surely the owner of property or his sole agent may annex conditions to a grant of the use of it.

Indeed there might be many considerations of public policy to support that course in case of merely executive or administrative papers like these, considerations affecting both the amount and safety of the revenue.

Nor is the State of Kentucky powerless. It has its own independent and complete system for taxing distilled spirits. True the power of the United States is supreme to the extent of having the first right, but the statutes of the State (section 4105 to 4114, inclusive, Ky. Stat.) provide ample machinery for compelling reports from distillers, and, indeed, everything else necessary for the purpose. The State has neither occasion nor right to call upon the United States nor her officers for reports made under the admistration of its laws in order to enforce the collection of the State revenue, nor would the United States have the right to call upon the State. Each government must take care of its own concerns in such matters, and it is much doubted by the court whether the Commonwealth of Kentucky or the government thereof in any way really makes or desires to make this claim, although her name is

used in the suit in the Carroll county court by the auditor's agent.

37 It may be added that the court has been influenced somewhat by the conviction that if the copies of the reports and the desired information were obtained from the collector they would be altogether inadmissible and incompetent as evidence, and that it would be ultimately *be* so held by the State court. While the collector was practically ordered by the State court to furnish or permit to be taken copies of the reports or else to compile therefrom the data demanded, there is no law authorizing the collector to authenticate copies of papers, nor to compile figures from them so as to make them admissible as evidence, and the State court cannot impose the duty upon him. He should not be imprisoned because the head of the department will refuse to authenticate them, and a statement by him of what the papers contain, without producing the originals or authenticated copies, would probably be mere hearsay and by no means the best evidence of their contents; and if there has been a fishing expedition merely to get information upon which to base ulterior movements by the plaintiff in the suit, surely the commitment of the petitioner would then be altogether inexcusable.

To sum up the whole matter, the court has reached the conclusion:

1st. That the reports are executive documents, which the United States in its sovereign capacity has acquired for the sole purpose of administering its own governmental affairs.

2nd. That the officers of the national Government cannot be compelled by another sovereignty to put those documents at its disposal without some express law of the United States authorizing it.

3rd. That such documents are privileged and to a certain extent quasi-confidential communications, the use of which is limited to the purposes for which they are made, unless the parties interested consent to a more extensive use. This proposition more especially applies to the reports of the storekeeper.

38 4th. That any demand for their use by any outside party must depend for success upon the courtesy of the Government and upon its notion as to the public policy of complying with the request.

5th. That no litigant has any right to their use in any other way or upon any other basis than such as may be fixed by the United States or under its authority.

6th. That the reports are property, and their ownership rests in the United States.

7th. That the State of Kentucky, either as a litigant or otherwise, has no right to exercise any control over them through its courts or otherwise except as the right may be given by congressional enactment or the courtesy of the Government.

8th. That the Secretary of the Treasury has lawful authority to control or to make regulations for controlling that property and its custody.

9th. That the regulations made were within its authority and show the only way in which the courtesy of the Government respecting the matter in hand will in the absence of legislation be exercised, and the courts have no power to overrule it.

10th. That the State court had no lawful jurisdiction, right, or power to impose upon the collector, an officer of another sovereignty, the duty of making copies of the reports, or that of permitting others to make them, or that of compiling information from their contents.

11th. That the reports were parts of the governmental archives accumulated through mere executive and administrative processes, and as such are privileged at least to the extent that no other sovereignty in its own interest can seize or control them for any purpose whatever without the consent of the sovereign owner lawfully manifested; and

12th. That the effort to make the collector testify to their contents is virtually an attempt to compel the United States to produce them.

39 The proposition underlying all the others is that nobody can acquire any control over or right in this class of papers belonging to the United States in any manner, except by its authority.

These conclusions seem to be supported by—

1 Greenleaf on Evidence, sections 250 and 251.
Jones, Law of Evidence, section 780.
United States *vs.* Eliason, 16 Peters, 291.
Hagood *vs.* Southern, 117 U. S., 52.
Ableman *vs.* Booth, 21 Howard, 506.
Cunningham *vs.* Macon, &c., R. R., 109 U. S., 451, 452.
Electoral Collecge Case, 8 Fed. Cases, 427.
Boyd *vs.* United States, 116 U. S., 616.
Black on Constitutional Law, 441.
Ex parte Reed, 100 U. S., 13.
Carr *vs.* United States, 98 U. S., 433.
Virginia Coupon Cases, 114 U. S., 286.
In re Ayers, 123 U. S., 443.

And to illustrate further it may be added upon the authority of *Ex parte* Roland, 104 U. S., 612, that if a mandamus should be sought in this case it would not lie, because no statute has ever made it the duty of the collector to do as required by the State.

Of course, it has not been forgotten nor overlooked that there are cases where the production of private papers in the possession of third persons not parties to the litigation can be exacted, but this is generally where the litigant has a rightful interest in them. The rule has no application here.

1 Greenleaf on Evidence, sec. 559.
1st ed. Am. & Eng. Ency. of Law, p. 257.

Otherwise the party is left to his own resources to obtain the paper or to lay the foundation for secondary evidence of its
40 contents. If the litigant has no right in or to the papers in the hands of the third person, nor any legal interest in them,

District Court of the United States for the District of Kentucky.

In the Matter of DAVID N. COM-GORE.

Assignment of Errors.

Comes now the respondent, John T. Boske, sheriff of Kenton county, Kentucky, and filed the following assignment of errors, upon which for himself and the Commonwealth of Kentucky he will rely in the prosecution of the appeal from the decision and judgment rendered by this honorable court on the 5th day of July, 1899, in the above-entitled matter:

1. That the said court erred in rendering the decision and judgment in the said matter against the respondent, acting as sheriff for and on behalf of said Commonwealth of Kentucky, as shown by him in his return to the writ issued herein against him, and in deciding that the imprisonment and detention of the relator by the respondent was in violation of the Constitution and laws of the United States, and in discharging the prisoner from custody and in rendering judgment against this respondent for costs, and that said judgment and decision is contrary to law and the facts, as stated in the pleadings in said matter.

44 2. That the said court erred in refusing to permit the introduction of the testimony of the witness Maxwell S. Barker, as follows: That he, while acting as State auditor's agent for Jefferson county, Kentucky, had obtained from collectors of internal revenue the information shown by their records, documents, and reports as to the amount of liquors stored in the bonded warehouses and the times and amount of withdrawals of liquors from bond, when he had the consent of the distillers as to whose product the information was sought, and the offer made in connection therewith to amend respondent's return to the writ.

3. That the court erred in not rendering a decision dismissing the petition, discharging the writ, and remanding the prisoner to the custody of respondent as sheriff aforesaid.

Wherefore respondent and appellant prays that the decision and judgment of said court be reversed and such directions given that full force and efficacy may be allowed to the process and writs of the Commonwealth of Kentucky by reason of the defense set up in the return and response to the writ issued against him herein, and for all proper relief.

WINSLOW & WINSLOW,
Attorneys for John T. Boske, Sheriff Kenton Co., and Commonwealth of Kentucky.

The appeal bond above referred to is as follows:

District Court of the United States, District of Kentucky.

In the Matter of DAVID N. COMINGORE, *Ex Parte.*

Know all men by these presents that we, John T. Boske, sheriff of Kenton county, Kentucky, principal, and George B. Winslow

and H. M. Winslow, as sureties, are held and firmly bound unto David N. Comingore in the sum of five hundred dollars, to be paid to the said David N. Comingore, executors or administrators;
45 to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of July, A. D. 1899.

Whereas the above-named John T. Boske, sheriff of Kenton county, Kentucky, hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the district court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named John T. Boske, sheriff of Kenton county, Kentucky, shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN T. BOSKE, [L. S.]
Sheriff of Kenton Co., Ky.,
By WINSLOW & WINSLOW, *Att'ys.*
H. M. WINSLOW. [L. S.]
GEORGE B. WINSLOW,
By HENRY M. WINSLOW,
Att'y-in-fact. [L. S.]

Sealed & delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk, U. S. Courts.

[10-cent stamp.]

CARROLLTON, KY., *July 11th*, 1899.

Know all men by these presents that I, George B. Winslow, of Carrollton, Ky., do hereby authorize and empower Henry M. Winslow, of Carrollton, Ky., as attorney-in-fact for me and in my name, place, and stead to sign my name as surety to any bond for costs or supersedeas bond or appeal bond that may be proper or necessary to be executed in order to appeal from the decision and judgment of the district court of the United States for the district of Kentucky in the matter of *habaas corpus* proceedings in behalf of D. N. Comingore, and supersede the same on appeal to the U. S.
46 Supreme Court or any other court to which he asks an appeal, giving to his acts in the premises the same effect as if done by me in my own proper person.

GEORGE B. WINSLOW.

Attest: JAMES L. WEBSTER.

DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the district court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 45 pages contain a true and correct transcript of the

record and proceedings in the matter of David N. Comingore, *ex parte*, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 21st day of July, A. D. 1899.

[Seal District Court of the United States for Ky. District.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

47 UNITED STATES OF AMERICA, } *ss.*:
District of Kentucky, Sixth Judicial Circuit, }

To David N. Comingore, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington on the* 12th day of August next, pursuant to an appeal granted by the district court of the United States for the district of Kentucky, wherein John T. Boske, sheriff of Kenton county, Kentucky, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal District Court of the United States for Ky. District.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twentyjfourth.

WALTER EVANS,
Dist. Judge.

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* Not exceeding 30 days from the day of signing.

48 I accept service of within citation for D. N. Comingore, July 21st, 1899.

R. D. HILL,
Att'y for D. N. Comingore.

Endorsed on cover: File No., 17,484. Kentucky D. C. U. S. Term No., 370. John T. Boske, sheriff of Kenton county, Kentucky, appellant, *vs.* David N. Comingore. Filed August 9th, 1899.



No. 370.

Brf. of Winslow, Carlisle & Taylor for Appt.

(17,484.)

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Nov. 18, 1899.

No. 370.

Clerk's Office Supreme Court U. S.
Received
NOV 18 1899
JAMES H. McKENNEY,
Clerk.

JOHN T. BOSKE, SHERIFF, &c., *Appellant,*

versus

DAVID N. COMINGORE, *Appellee.*

BRIEF AND ARGUMENT FOR APPELLANT.

Right of a State Court to compel a Collector of Internal Revenue to produce, and testify from, records in his office, showing the amount of distilled liquors on hand in bonded warehouses, in a proceeding on behalf of the State, wherein it was sought to have such liquors listed for regular state and county taxation.

Jurisdiction of United States District Court in *habeas corpus* proceedings.

***Constitutional* limitation on the power of the Executive Departments of the United States to make, alter or declare law.**

***Regulations* of the United States Treasury Department are not *laws*, but regulate its officers only in their *administrative* duties.**

The officers of the Treasury Department are bound to obey the plain provisions of the common law, except where otherwise provided *by statute*.

HENRY M. WINSLOW,
For Appellant.

JOHN G. CARLISLE, New York City;
WILLIAM S. TAYLOR, ATTORNEY-GENERAL, Frankfort, Ky.;
RUSSELL & WINSLOW, New York City;
WINSLOW & WINSLOW, Carrollton, Ky.;
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 370.

JOHN T. BOSKE, Sheriff of Kenton County, Ky., Appellant, vs. DAVID N. COMINGORE, Appellee.	APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY. 17,484.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a judgment in a *habeas corpus* proceeding in which it was held that the restraint of the petitioner was in violation of the Constitution and laws of the United States and that he, therefore, be discharged.

The Commonwealth of Kentucky on relation of its Auditor by his duly appointed revenue agent for Carroll County, instituted a proceeding in the Carroll County Court against Louis T. Block and others, copartners as distillers, by which the Commonwealth of Kentucky sought to have listed, valued and assessed for taxation spirituous liquors in bond belonging to said Blocks, and theretofore omitted by them from such listing for State taxes as pro-

vided by law. The proceedings seeking to list, value and assess this omitted property were instituted in pursuance of sections 4241 and 4258 of Barbour & Carroll's compilation of Kentucky Statutes (1894) which are as follows:

SECTION 4241. SHERIFF OR AUDITOR'S AGENT TO LIST PROPERTY OMITTED.--SUMMONS AGAINST OWNER.—TRIAL.—PENALTY. It shall be the duty of the Sheriff or Auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the Assessor, Board of Supervisors, Board of Valuation and Assessment, or Railroad Commission, for any year or years. The officer proposing to have such property assessed shall file in the Clerk's office of the county in which the property may be liable to assessment, a statement containing a description of the property proposed to be assessed and the value of the corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years (days) after the filing of such statement, the Clerk of the Court shall issue a summons against the owner to show cause before the next Regular Term of the County Court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the Sheriff of the county by delivering a copy thereof to the owner, if in the county; if not, then to his agent, attorney or person in possession of the property. At the next Regular Term of the County Court after the notice has been served five days, if it shall appear to the Court that the property is liable for taxation, and has not been assessed, the Court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order of the Court deciding whether or not the property is liable to assessment, either party may appeal, as in any other civil cases, except that no appeal bond shall be required where the Court decides that the property is not liable to assessment for taxation. If the Court shall decide that the property is liable to assessment, the

Clerk of the County Court shall certify to the Auditor of Public Accounts and the Sheriff, a description of the property and the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As a compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The County Clerk shall enter all such assessments, the name of the persons against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment (see further Sec. 4258).

Section 4258. Auditor may appoint and remove agent in each county. The Auditor of Public Accounts may appoint an agent in each county of this Commonwealth. This agent shall hold his office and be removed at the pleasure of the Auditor (see further, as to duties, Sec. 4241, Transcript, p. 1).

The United States Government under laws which we deem unnecessary to cite to this Honorable Court, takes charge of all spirituous liquors manufactured in the United States from the time of manufacture until the tax which it imposes thereon has been paid. It requires these liquors to be kept in what are known as government bonded warehouses, and appoints, and places in charge of them, officers, known as storekeepers, who keep the keys to the warehouses and allow no one to enter without authority or express permission. It requires these storekeepers, under oath and bond, to ascertain and make and keep an accurate record of the amount of these liquors and report the same monthly to the Collector of the Internal Revenue district in which

the warehouse is situated (U. S. Rev. Stat., 3301). This monthly report embraces "* * * the "number of packages of all articles with the respect- "ive description thereof as above provided, which "remained in the warehouse at the date of his last "report, of all articles received therein or delivered "therefrom during the preceding month, and of all "articles remaining therein at the end of said "month." From these reports can be definitely and readily ascertained the true amount of liquors on hand at any given date.

By Section 3307 of the U. S. Revised Statutes, the distiller himself is also required to make a monthly report, showing among other things the number of wine gallons and of proof gallons of spirits produced and placed in the warehouse; and Section 3294 shows the form for application for withdrawal on payment of the tax thereon which may be made to the Collector at any time.

The Commonwealth of Kentucky by its laws requires the distillers to list and report for valuation and assessment for taxes the liquors so stored in such warehouses on such day in each year as is fixed for the valuing for taxation of other property in the State and taxes it only at the same rate as other property is taxed (see Kentucky Statutes, *supra*, Secs. 4105 to 4114, Appendix, pp. 44–46).

But for the reason among others that the United States Government takes actual custody and control of these warehouses and the liquors therein through its officers and especially these storekeepers, and holds it (now for a period of as much as eight years), in order to make sure of its heavy revenue tax thereon and to prevent frauds against that Government in the return of such property for taxation and the payment of the tax thereon, the State Government must wait until that tax due to the United States Government is first paid before it can proceed to hold such liquors for the taxes due to the State Government thereon and is thus placed at a disadvantage in ascertaining the quantity thereof in

such warehouses. By reason of the fact that these liquors were so held in custody and possession by the United States officers so that they could not be subjected to the annual payment of taxes, they for many years (until after 1882) eluded taxation for State and county purposes. Since that time attempts (more or less successful) have been made to tax them, deferring the payment of the tax until they should be withdrawn from bond; these attempts finally resulting in the enactment of Sections 4105 to 4114 of Kentucky Statutes.

But this was evaded in many instances, it is believed, by the failure to report anything like the full quantity actually on hand and the refusal of the officers of the United States Government in charge to allow the quantity to be ascertained.

Therefore in the proceeding referred to above, instituted in the Carroll County Court under the sections of the statutes quoted, the Collector of the district not being a resident of Carroll County, his deposition upon due notice was attempted to be taken at his office in order to prove by him from the records, which he admits are in his custody and control as Collector, the facts as to the true amount of such liquors subject to State and county taxation and omitted by the defendants in that proceeding, from their reports to the State for taxation for many years back (Transcript, p. 2).

At the taking of the deposition he declined to state the amount of such liquors from his records thereof in his custody as Collector, or to furnish copies of the records or to permit inspection thereof by the officers or agents of the State, saying that the records are in his custody as Collector only, and that by Section 3167 of the Revised Statutes of the United States and the rulings of the Department he is prohibited from doing so and he declines to do so (Transcript, p. 2).

Thereupon, in pursuance of the practice according to the Kentucky Code (Sections 535 and 538; see Appendix, p. 45), the officer taking the deposition,

and afterwards the Court itself, upon report to it by the officer, entered up judgment against him of fine and imprisonment, adjudging also that he should answer and give the information from his records, or copies from them, or permit an inspection of them so that copies might be taken. He is thereafter, and before the judgment of the Court for fine or imprisonment is attempted to be enforced, given another opportunity to answer and furnish the information soaght as evidence in the proceeding, and still declining to do so, he is taken into custody by the Sheriff of Kenton County, under the judgment both of the officer taking the deposition and of the court itself, for the purpose of enforcing it. He then files the petition for that purpose before the United States District Court at Louisville, and sues out the writ of *habeas corpus*, claiming "that the records of deposits of liquors in "bond and requests to withdraw liquor from bond "and official records made therefrom * * * "were privileged, and for that reason and because "of the said regulations of the Secretary of the "Treasury and the Commissioner of Internal "Revenue made conformably to law, he could not "be legally and he ought not to be required to tes- "tify as to the amount of said record or to file "copies of the same or to permit access to the "same" (Transcript, p. 4).

The regulation referred to as authorizing the refusal is copied in the transcript as Exhibit B on pages 8 and 9.

The appellant, as Sheriff of Kenton County, Ky., having appellee in charge under said judgment of the Court and writ from the officer engaged in taking the deposition, and being about to enforce the same by committing him to jail, was served with the writ of *habeas corpus*, and made his response thereto setting forth these facts, together with copies of the writ issued by the officer taking the depositions, and of the judgment of the Court, setting forth also certain correspondence with the Treasury

Department at Washington, and after setting forth the facts and his authority for arresting appellee in order to commit him for the contempt of court adjudged against him, the appellant as respondent in the proceedings set forth:

"that Sec. 3167 of Rev. Stat. of the United States "has no application to the question in controversy "and that the Secretary of the Treasury and the "Commissioner of Internal Revenue are executive "and not legislative officers of the Government, and "under the Constitution have no authority to make "laws or any rules or regulations to have such "effect, except upon their subordinates, with regard "to their relations as officers with the Government, "and that such must be made conformably to the "law of the land upon the subject of evidence and "cannot be of any force, as between the States or "the States and citizens or taxpayers to alter, "change, or effect the law regularly accepted or "adopted by the Government or enacted by the "regular legislative authorities, nor are the facts "sought to be elicited from the records and "documents as evidence and pertinent to the issue "involved, in any sense 'State secrets' or 'privileged communications" in contemplation of law "as heretofore adjudged by those appointed under "authority to exercise judicial functions in this "Government (*In re* Hirsch, 74 Fed. Rep., 928; 87 "Fed. Rep., 1005), and to sustain the witness and "direct him to be discharged from custody would "be to allow him, upon whom alone executive functions devolve in the discharge of the duties of his "office to be judge of the law as against the regular "elected county judge of the State county court, "and to uphold a law attempted to have been enacted by another merely executive officer of the "Government, and thus both legislative and judicial functions be usurped by the executive "officers" (Transcript, pp. 11-15).

This is the question involved in this appeal, the District Court having rendered a judgment discharging the prisoner on the ground that he was justified in declining to testify from his records, or to give copies of them or to permit access to them for the purpose of taking copies to be proven in evi-

dence in the State Court in order to show the quantity of liquors on hand in the bonded warehouses subject to State taxation, and adjudging "that the "imprisonment and detention of the relator by the "respondent is in violation of the Constitution and "laws of the United States."

ERRORS AND ARGUMENT.

I.

Taking the errors assigned appearing on page 30 of the Transcript, and points involved in them, in the inverse order in which they there appear, in order to leave the main point involved on the full merits of the case for the concluding part of our argument and to get at the questions in point of time as they arose, we commence with the third assignment as there laid down and argue it first.

THE COURT ERRED IN NOT RENDERING A DECISION DISMISSING THE PETITION DISCHARGING THE WRIT AND REMANDING THE PRISONER.

As we understand, the opinion of the Circuit Court of Appeals affirming the case of Hirsch, appearing in 87 Fed. Rep., 1005, a *habeas corpus* proceeding is not proper to determine a question like the one arising in this case; but we do not care to take up time to argue this point further than to state it except as the argument on the main question involved may also tend to elucidate this one (see also *ex parte* Reed, 10 Otto, 13–25), as follows:

"Here there was no defect of jurisdiction as to "anything that was done. Beyond this we need "not look into the record. Whatever was done, "that the Court could do under any circumstances, "we must presume, was properly done. If "error was committed in the rightful ex-"ercise of authority, we cannot correct it.

"A writ of *habeas corpus* cannot be made to "perform the functions of a writ of error. To war- "rant the discharge of the petitioner the sentence "under which he is held must be, not merely er- "roneous and voidable, but absolutely void" (*Ex parte* Kearney, 7 Wheat, 38; *ex parte* Watkins, 3 Pet., 193; *ex parte* Milligan, 4 Wall., 2. See also *ex parte* Crouch, 112 U. S., 178, and cases there cited).

II.

As to the error in refusing to permit the "in- "troduction of the testimony of the witness Max- "well S. Barker, as follows: That he while acting "as State Auditor's agent for Jefferson County, "Kentucky, had obtained from Collectors of In- "ternal Revenue, the information shown by their "records, documents and reports as to the amount "of liquors in the bonded warehouses and the times "and amounts of withdrawals of liquors from bond, "when he had the consent of the distillers as to "whose product the information was sought, &c."

Upon this point we wish to say that such testimony was pertinent as showing that the Internal Revenue Department did not regard these reports and documents as really containing any "State secrets" or as against "public policy" or else they would not give out the information when the consent of the distiller was obtained, and this position taken by the *department in actual practice*, with regard to these reports, is strongly cumulative evidence on this point as to their not containing any "State secrets," or being against "public policy," if any evidence is in fact needed other than the very nature of the facts required to be shown by them, which are mainly the amount of liquors deposited in the warehouses, and withdrawn from them and remaining therein at any given time, and especially at the close of business on the last day of each month and at the beginning of the succeeding

month. This *cumulative* evidence as to how the *department regarded* the information contained in the reports was only offered in extreme abundance of caution.

III.

The third error we take up (assigned as 1, in the assignment of errors) brings up the main question on the merits, as to whether "*The imprisonment "and detention of the relator by the respondent was "in violation of the Constitution and laws of the "United States*" (Transcript, p. 30).

Detention not in violation of Constitution.

The Court decides in the judgment, "that the "imprisonment and detention of the relator by the "respondent is in violation of the Constitution and "laws of the United States" (p. 11), but in the opinion the strongest and the only way it states the violation of the Constitution is thus (pp. 27-28):

"*If* the litigant has no right in or to the papers "in the hands of the third person, nor any legal "interest in them, it *might possibly* violate the 4th "amendment of the Constitution to force the latter "to produce them by an unwarrantable seizure, "actual or constructive; and in another connection "so far as the distillers' reports are concerned Boyd "*v.* United States might again apply."

Boyd *vs.* United States (116 U. S., 616), however, has no possible application to the case at bar. In that case the attempt was made to produce *private* papers, which were in the possession of the *defendant himself*, and the proceeding was a *quasi* criminal proceeding. *Such* a production might possibly be prohibited by the 4th amendment, though this Honorable Court was not unanimous on that point. In the case at bar there

is not a *single element* which is analogous to the Boyd case, for we were seeking evidence contained in *public documents* (as is *admitted in the prisoner's petition*) which were in the possession of a *third party* (*a mere witness*, having no interest whatever in the proceedings) and the proceeding was a civil action (as admitted by the learned Judge below) and there was no attempt whatever at any such search or seizure as is contemplated by the 4th amendment.

It is clear from this that the 4th amendment has no application to the case at bar, and as that is the only provision which is claimed to be violated, the lower Court clearly erred in holding that the prisoner was in custody in violation of the Constitution.

Detention not in violation of LAWS of United States.

From reading the judgment one would naturally be led to believe that the Court in the opinion to be written would cite some *statutory* provision of the law bearing directly on the point, and inhibiting any detention for such cause, but the opinion discloses none such. And the opinion before attempting to cite any statutory provision having any, even an *indirect*, bearing on the question, attempts to shift the points as stated in the judgment proper, where the burden of showing some such was rightfully left on the petitioner, and to place the burden on the respondent, stating the point in this way:

"But there is no statute or law of the United "States which *authorizes or permits* the collector of "internal revenue to make or certify for use by "any one else copies of the reports which have "been gathered for particular governmental pur- "poses." * * * "No statute is shown which "gives the litigant in this case any right to claim "the use of the property—the private property of "the United States—for any purpose whatever." "* * * The purpose for which the litigant desires "the property cannot effect the question of its right "to it. It would not be contended that the State of "Kentucky had any right to claim the property or

" its use except for the single quality it is supposed " to have of silently testifying upon the issues in- " volved in the case against Elias Block & Sons. No " logic is perceived in the possible suggestion that " that makes a difference in right, though it may " make the use more desirable in fact." * * * " No statute is shown to *justify* the claim now made, " though a statute is *necessary to make the claim* " *good.*"

We do not comprehend how the learned Court gets this idea that any statute of the United States is necessary to justify the claim made. To require this and put us on the affirmative is in contravention of Section 753 of the statutes under which the writ of *habeas corpus* was issued and which expressly prohibits the issuance of the writ unless the prisoner is in custody in *violation of the Constitution or of a law* of the United States. We claim that no United States statute is necessary on which to base our right to the evidence sought to be obtained, and no law other than the regular rules of the common law on the subject of evidence, and that the United States Government and its Courts recognize and accept these rules and the statutory rules enacted and adopted in the several States respectively as applicable to cases arising within their respective jurisdictions.

Having now shown that no right of the prisoner under the Constitution or statutes of the United States was violated, we will now show OUR ABSOLUTE RIGHT TO THE TESTIMONY UNDER THE COMMON LAW.

We were not allowed by the limited time at the command of the Court below on the trial, after we learned the position taken by him on this point, to argue or state it in a satisfactory manner. This right and the authorities on which we rely we now state more fully as follows:

FIRST.—As to the reports of the defendants themselves:

The evidence sought from the admissions or reports of the distillers to the Internal Revenue

Office as to amount of liquors made or on hand are not "privileged," but are mere admissions made at most under legal constraint, and clearly competent as such in this, a civil action.

"Evidence of an admission is not excluded in a "civil action, because it is made under *legal com-* "*pulsion*, if the person making it was not imposed "upon or under duress."

9 Am. & Eng. Ency., 1st Ed., 354, and
1 Am. & Eng. Ency., 2d Ed., 716, citing
Newhall *v.* Jenkins, 2 Gray, Mass., 562, and English cases.
See also 1st Greenleaf, Sec. 193, citing some English cases and giving digest of them in a note.

SECOND.—As to the reports and other records or documents made by the storekeepers and other officers or employees in the Internal Revenue Department:

These officers were public officers, under oath and bond to perform their duties. It was part of their duties to make these reports. They did make them. They were made from their own personal knowledge. Under such circumstances the law is plainly laid down as follows:

"Documents of a public nature and of public "authority are generally admissible in evidence, "although their authority is not confirmed by the "usual tests of truth, the obligation of an oath, "and the power of cross-examination. The ex- "traordinary confidence thus reposed in such docu- "ments is founded principally upon the circum- "stance that they have been made by authorized "and accredited agents appointed for the purpose, "but partly also on the publicity of their subject "matter; moreover, it would always be difficult, "and often impossible, to prove facts of a public "nature by means of actual witnesses examined "upon oath. To render such documents, when "properly authenticated, admissible as evidence,

" their contents must be pertinent to the issue. It " is also necessary that the document be made by " the person whose duty it was to make it, and " that the matter it contains be such as belongs to " his province, or comes within his official cogni- " zance and observation. *Documents having these* " *requisites* are, in general, admissible to prove, " either *prima facie* or *conclusively*, the facts they " recite.

* * * * * *

" The books of a public officer, in which he is re- " quired by a statute or by the nature of his office " to record his official transactions, are admissible " as evidence of such transactions. But these books " are in general evidence only of such facts as are " required to be recorded therein.

" OFFICIAL REPORTS.—When a person is required " by law to make a report or return of his acts, his " report or return is a public record of his act, and " as such admissible as evidence thereof."

9 Am. & Eng. Ency. Law (2d Ed.), 880, 883, 882.

See also—

1 Greenleaf, Secs. 483, 484.
2 Jones on Evidence, Sec. 520.

Greenleaf expressly mentions official registers of "*custom houses*," " tax rolls," &c., each of which cover the papers sought in this case. This Honorable Court has fully recognized the same rule as making admissible in evidence:

" Official registers of records kept by persons in " public office in which they are required, either by " statute or by the nature of their office, to write " down particular transactions occurring in the " course of their public duties or under their personal " observation (Taylor Ev., Sec. 1429; 1 Greenleaf Ev., " Sec. 483). To entitle them to admission it is not " necessary that a statute *requires* them to be kept. " It is *sufficient* that they *are kept in the discharge* " *of a public duty* (1 Greenleaf Ev., Sec. 496). Nor " need they be kept by a public officer himself, if the " entries are made under his direction by a person " authorized by him (Galt *v.* Galloway, 4 Pet., 332).

"It is hardly necessary to refer to judicial decisions "illustrating the rule. They are numerous."

Evanston *v.* Gunn, 9 Otto, 666–7.

And as to records kept by a jailer.

See White *vs.* U. S., 164 U. S., 100.

As to the plaintiff's right to have the documents, &c., produced to use as evidence, and to require the Collector to testify in regard thereto:

It is important to distinguish as to an inspection for the purpose of obtaining mere information, and the far more important act of producing testimony. Plaintiff is demanding testimony, which is shown to be extremely pertinent to the issue; it is only under peculiar circumstances that any one can be forced to give mere information or produce papers before trial; and it is likewise only under very peculiar circumstances that a court of justice, particularly in a civil case, will not compel a witness to tell the truth, and the whole truth, so far as the same may have come to the knowledge of the witness, and will not also compel the witness to produce any papers he may have which will tend to make out the case of the party demanding it. So far as we can call to mind the only exceptions are in cases where the testimony would tend to incriminate the witness himself, or where the matter about which he is asked to testify is a privileged communication. We will treat of these two exceptions later.

We find the following good, wholesome law on this subject:

"It may be laid down as a general rule that the "Queen's Bench Division will enforce by mandamus "the production of every document of a public na- "ture, in which any one of her Majesty's subjects "can prove himself interested. *Every officer*, there- "fore, appointed by law to keep records ought to "deem himself a trustee for all interested parties,

" and allow them *to inspect* such documents as con-
" cern themselves *without putting them to the ex-*
" *pense and trouble of making a formal application*
" *for a mandamus.* But the applicant must show
" that he has some direct and tangible interest in
" the documents sought to be inspected, and that
" the *inspection is bona fide required* on some
" special and *public ground*, or the Court will not
" interfere in his favor; and therefore if his object
" be merely to gratify a rational curiosity or to ob-
" tain information on some general subject, or to as-
" certain facts which may be directly useful in some
" ulterior proceedings, he cannot claim inspection as
" a right capable of being enforced.

" Thus the ratepayers of a county are not entitled
" to inspect and copy the bills and charges of county
" officers, which, having been paid by the Treasurer
" under orders of justices, have become items in his
" accounts and which have been allowed by the ses-
" sion and deposited by the clerk of peace among
" the county records. For in such case the individ-
" ual ratepayer would have no power to interfere,
" even though they might prove to demonstration
" that the bills had been improperly paid and al-
" lowed."

2 Taylor on Ev., 8th Ed., Sec. 1493, quoted in 19 Am. & Eng. Ency. Law (1st Ed.), page 230, note 4.

It will be noticed that the foregoing authority refers to an inspection. By how much the more can such records and documents be produced as evidence when clearly competent and pertinent. They are certainly "public"; our demand for them is certainly "*bona fide*" and "required on some special " and public ground"; and we desire to use it as evidence in the pending proceeding, and not in " an ulterior " or past proceeding nor as information on which to base a contemplated proceeding. The plaintiff certainly has "an interest" therein, as these papers sought to be produced contain evidence of its right to a large sum of money. Again:

" A postmaster cannot refuse to obey a subpœna
" to produce in court the record of his office contain-
" ing names of box-holders on the ground that it

" would be contrary to the regulations of the Post " Office Department."

Rice *vs.* Rice (N. J. Ch.), 25 Atl., 321.

This last authority is exceedingly close to our point. Again:

"In a proceeding for the forfeiture of distilled " spirits on the ground of a fraudulent violation of "the Internal Revenue Law the Government" (which was the plaintiff in this action) " will not be re- " quired, on motion of an intervening claimant, to " furnish such claimant before trial with the report " of the gauger showing the measurements of the " packages containing such spirits, such report being " of file in the proper district, and the claimant, being " entitled, on application there, to an inspection or " a certified copy of same."

United State *vs.* 164 8/100 Gal. Spirits, 82 Fed., 205.

The Court will find the above case in the same volume of the Federal Reporter as the case of "*In re* Weeks," relied upon by petitioner in Court below.

We presume it will not be seriously questioned that the right of one to be kept secure in regard to his private affairs, is more zealously guarded by the rules of law than public papers. In fact, the fourth Amendment to the United States Constitution especially protects private papers. This being true, the case of Marion National Bank *vs.* Abell's Admr., 88 Ky., 431, is a very strong one in point.

That first states four rules in regard to producing papers, which are not material to the issue in the case at bar except to show that the *Court went over the whole subject and announced the law in almost every phase.* Those four rules refer to production of papers not in evidence, but merely for information and inspection. After laying down those rules the Court proceeds to lay down another, as follows:

" Here it is not claimed that the appellee has any " right, title or interest in the books of the bank.

"All that is claimed is that said firms, under their "various firm names, made deposits in the bank, and "checked on them from time to time; that the ap- "pellee does not know how these accounts stand, "nor the number of firm names that appear on the "books of the bank as having had dealings with it, "but that the books will show these things, and "she wishes experts to overhaul them and report to "her.

"These officers of the bank are competent to tes- "tify to all these things. When they give their "depositions, if they should be taken, *either side* "*may compel them to produce the bank books*, and "*submit them to the inspection of the parties them-* "*selves and their attorneys*, or either of them, for "the purpose alone of inspecting the accounts be- "tween the bank and said firms; *also the officer* "*testifying may be compelled to give a full state-* "*ment of the accounts, item by item, as they appear* "*on the books, and to file with his deposition a* "*transcript of said accounts.* In this way, which "is the plain way pointed out by the common rules "for the prouction of evidence, the appellee can "obtain the whole truth, which is all that she is en- "titled to. No one ever heard of a witness being "ruled to make known to either party what "his testimony would be until after the "case was put under investigation, and he "put on the witness stand. We see no good "reason for making him submit his books to either "party, for his inspection, in advance of the time "that he may be required to introduce them as a "witness in the case."

Marion National Bank *vs.* Abell's Admr., 88 Ky., 432.

In this manner the Kentucky court of last resort clearly draws the distinction between producing papers for a mere inspection, and producing them as evidence. Where the person demanding the inspection had no right, title or interest in them the inspection was refused, but it is clearly and distinctly stated that the *witness has no right to refuse to produce them in evidence, when called upon to testify*, and that he may be required to testify as to each item in the account, and

further that he may be required to file with his deposition a transcript of said accounts. And the papers in that case were private papers, by how much the more we have the right to have public documents, records, papers, &c., produced or the facts shown by them adduced in evidence, which is exactly what we asked in the State court and which it granted. The reasoning and decision of a learned judge of a U. S. Circuit Court on a similar question, *in re* Hirsch 74 Fed., Rep., 933, afterwards affirmed by the Circuit Court of Appeals, sustains this decision of our State court of highest resort and seems to us thoroughly sound and conclusive. We quote from him as follows:

"Upon the subject of power generally in courts "of common law to compel by subpœna *duces tecum* "the production of written papers to be used as "evidence, the question with respect to both private "and public or official documents was carefully con- "sidered, and was settled by the Judges of the "Court of King's Bench in 1801, who decided that "such power existed, that a subpœna was the "proper method, and who, speaking by Lord Ellen- "borough, said that: 'The right to resort to means "' competent to compel the production of written "' as well as oral testimony seems very essential to "' the very existence and constitution of a court of "' common law, which receives and acts upon both "' descriptions of evidence, and could not possibly "' proceed with due effect without them (Amey *v.* "' Long, 9 East., 472).'

"The Court intended to assert the general power, "but took occasion to say that exceptional cases "would arise where it would not be enforced, as, "for instance, that a witness would not be com- "pelled to produce papers which he obtained confi- "dentially as counsel or attorney (King *v.* Dixon, 3 "Burrows, 1887; Miles *v.* Dawson, 1 Esp., 405; Bate- "son *v.* Hartsink, 4 Esp., 43).

"The question, then, *becomes one, not of power* "*generally*, but whether this class of evidence has "any special immunity peculiar to itself, or whether "the officers of the revenue have a special reason "for exemption as witnesses. An indefinite idea "exists that there is an unfairness in being a vehi-

" cle by means of which this evidence is obtained;
" but *there can be no implied obligation upon the*
" *government*, because it has received a special tax
" from an offender against the laws of the State,
" to shield from the consequences of his act. Such
" an idea is at variance with the statutes and the
" decisions of the Supreme Court."

In re Hirsch, 74 Fed., 933.

Having shown the existence of this general power under the common law, it is now proper to consider whether or not any exception to this general rule forbids the production of this testimony The Hirsch case treats of the exception clearly. On the question of "privilege" claimed under Section 3167, as amended by the "thirty-fourth section of the "Act of August 27, 1894," and the question as to any inconvenience that might arise from having to furnish such simple facts in evidence, it says:

" It is next said that these returns are privileged.
" It is probable that a statute could declare that
" communications of taxpayers to a board of asses-
" sors or officers of a similar character should be
" privileged, and that no returns can be examined
" by any one, or be reached for examination by
" legal process. The thirty fourth section of the
" Act of August 27, 1894, which endeavored to make
" income tax returns entirely free from examina-
" tion or inspection by unauthorized persons, did not
" go so far as to say that they could not be sub-
" jected to examination by courts, but declared
" their freedom from examination '*except as pro-*
" *vided by law.*' *In the absence of such provisions the*
" *returns now in question are no more privileged*
" *than other taxpayers' returns*, in the sense that
" they must be kept secret, and cannot be produced
" for the purpose of evidence in a legal proceeding
" by order of court.

" The remaining objection is that the officers may
" be subjected to inconveniences and to interruptions
" in the discharge of their official duties. It is un-
" doubtedly true that such occasional inconvenience
" will take place; but, so far as objections from this
" cause are concerned, the obligations of the officers
" of the internal revenue department, in regard to
" conformity with the requirements of a court for the

"production of books and papers, are much like "the obligations of the members of a large mer- "cantile firm or the officers of a business corporation. "Individuals are compelled to furnish this class of "evidence in cases in which they have no interest; "and, though the officers of corporations have "urged the inconvenience of being compelled to "carry their books into court for the benefit of "others, such an objection has not prevailed in the "Federal courts.

"It may be inconvenient, and sometimes embar- "rassing, to the manager of a corporation to re- "quire its books and papers to be taken from its "office and exhibited to third persons, but it is also "inconvenient and often onerous to individuals to "require them to do the same thing. Considera- "tions of inconveniences must give away to the par- "amount right of litigants to resort to evidence "which it may be in the power of witnesses to pro- "duce, and without which grave interests might be "jeopardized and the administration of justice "thwarted" (Wertheim *v.* Trust Co., 15 Fed., 716). "As a matter of course, a court will exercise its "sound discretion with reference to the neces- "sities of the case, and will not ordinarily com- "pel the detention of books which are in "daily use, or compel public officers to bring public "documents into court when the production of "copies will equally answer the purpose (Corbett *v.* "Gibson, 16 Blatch., 334, Fed. Cas. No. 3, 221; De- "laney *v.* Regulators of City of Philadelphia, 1 "Yeates, 403)".

In re Hirsch, 74 Fed., 934.

Another objection set forth in the opinion of the Court below in the case at bar is as follows:

"In many cases copies of the public records of "the United States may be authorized by the "head of the department or other ultimate custo- "dian. * * * But there is no statute or law of the "United States which authorizes or permits the "collector of internal revenue to make or cer- "tify for use by any one else copies of the reports "which have been gathered for particular govern- "mental purposes" (Tr., p. 21).

The learned Judge in the Hirsch case had fully met that point as follows:

"The point was made by the petitioner that he did "not have the legal control of the papers, which "were in the legal control of the collector of the "district; and the case of Bank *v.* Hillard, 5 Cow., "158, was cited, in which it was held that the clerk "of a banking house was not bound to produce its "books, upon a subpœna *duces tecum*, the cashier "being the proper custodian. In this case the "collector's office was in Hartford, while the peti-"tioner's office was at Norwich, where the papers "were actually kept and were in his actual custody. "It is not necessary to serve a subpœna upon the "person who is merely technically in control, but "who is not in the town, and not in charge of the "office where the papers are actually kept. The "person in actual possession, as the head of the "office where the papers are actually kept, should "produce them (Corsen *v.* Dubois, 1 Holt, 239; "Amey *v.* Long, 1 Camp., 17)."

In re Hirsch, 74 Fed., 934.

It will be noticed that in the Hirsch case the point was made that the deputy, though having the papers in actual custody, was not the custodian and should not produce them, but the Court held that the actual custodian (as in this case the collector admits himself to be), and not the head of the Treasury department, is the proper person to re quire to produce them. This case further develops the soundness of that rule. For if the State must go to the head of the department of the treasury, he might be beyond its jurisdiction by process of contempt, and certainly it would occasion more trouble and inconvenience for him to have to submit to an examination as a witness, than the collector to whom as the actual custodian of the papers the Secretary of the Treasury would in all probability have to send or else remit the party seeking the facts to him, as the actual custodian of them.

The regulations relied on not authorized.

The regulations relied on and copied in full on pages 23 and 24 of the transcript are not authorized by any statute.

Congress has never attempted, either in sections 161, 251, 321 or 3167, or any other section of the statutes, to confer any such power on the Commissioner or the Secretary of the Treasury.

In all of said sections except 321 Congress has always placed the clear restriction that the regulations must be "not inconsistent with law," and section 321 only authorizes the Commissioner to prepare and distribute regulations "pertaining to the assessment and collection of internal revenue." The document relied on by the District Court and called a "regulation" in no way pertains to the "assessment or collection of internal revenue," but contains merely the legal opinion of the Commissioner as to the power of the courts to compel the production of certain evidence, *with instructions to the Collector to disobey the orders of the Court*, in case the courts hold to an opinion different to that entertained by the Commissioner.

If Congress did attempt to confer upon the Commissioner of Internal Revenue or upon the Secretary of the Treasury the power to make laws, such attempt would be absolutely void under the very first section of the United States Constitution which vests all legislative power in Congress.

Furthermore, while the Commissioner is clearly entitled to have an opinion as to what is the law, he has no authority to declare the law as a finality, and to set his opinion above that of the courts. To permit him to do so is to violate Section 1, Art. III., of the Constitution.

Let us elaborate the foregoing statements briefly.

Under Section 161, we cheerfully accord the heads of the departments the authority to prescribe "regulations," but they must be *regulations*, not laws, for

the section expressly recognizes the constitutional limitation, and says they must be "not inconsistent with law." Then what does the section expresely say the regulations are to be for? "*for* the government of his department," (for) "the conduct of its officers and clerks," (for) "the distribution and performance of its business and the custody, use and preservation of the records, papers and property belonging to it," *i. e.*, that they are to be merely and purely as to their effect *administrative only* in their nature and do not affect things other than the administration of the department, and cannot take the department and its officers out from under the regular laws of the land, as is claimed for them in these proceedings.

Section 251 (evidently referred to by mistake in the opinion of the Court below as 261), contains this same provision of limitation, viz.: "Not inconsistent with law," and upon careful reading shows itself to be of the same nature, *i. e.*, that the "forms of entries, oaths, bonds and other papers and rules and regulations, not inconsistent with law" and authorized under it, are to be merely and purely administrative in their nature, and do not effect the general rules of law in the courts. But the regulation relied upon and printed in the record was more likely intended to be drawn under the assumed authority of Section 321, which authorizes a regulation by the Commissioner, under the direction of the Secretary; but it overleaps the power given in that also. The portion of that section at all applicable to the question reads, as follows:

"The Commissioner of Internal Revenue, under "the direction of the Secretary of the Treasury, "shall have general superintendence of the assess- "ment and collection of all duties and taxes now "or hereafter imposed by any law providing in- "ternal revenue, and shall prepare and distribute all "the instructions, *regulations*, directions, forms, "blanks, stamps and other matters pertaining to the "assessment and collection of internal revenue.

Notice the wording again. "Regulations." Regulations what? "Regulations pertaining." Pertaintaining to what? Pertaining to the *assessment and collection of internal revenue.*" Surely it will not be seriously claimed that this confers any authority upon the Commissioner *to change the rules of the common law in regard to the production of evidence.* The power to *change law* is vested solely in Congress by the very first section of the Constitution, consequently if Congress did attempt to confer any such authority upon the Commissioner it is null and void. Neither has the Commissioner any authority to *declare law as a finality*, as the first section of the third article of the Constitution expressly confers this upon the judiciary.

In support of our construction of these sections of the statutes authorizing the making of regulations by the Treasury Department, we quote again from the Hirsch case as follows:

"It is probable that *a statute* could declare that "communication of taxpayers to a board of asses- "sors or officers of a similar character should be "privileged, and that no returns can be examined "by any one, or be reached for examination by "legal process. The thirty-fourth section of the "Act of August 27, 1894, which endeavored to "make income tax returns entirely free from exam- "ination or inspection by unauthorized persons, did "not go so far as to say that they could not be sub- "ject, to examination by courts, but declared their "freedom from examination 'except as provided by "'law.' *In the absence of such provisions* the re- "turns now in question are no more privileged than "other taxpayers returns, in the sense that they "must be kept secret, and cannot be produced for "the purpose of evidence in a legal proceeding by "order of Court."

In re Hirsch, 74 Fed., 934.

By referring to the thirty-fourth section of the Act of August 27, 1894, it will be found that that section of that act is an amendment to Section 3167 of the Revised Statutes (which is one of the sections

relied on by the petitioner and cited by the lower Court in support of its opinion). The above quotation from the Hirsch case shows clearly that there has been no attempt by the lawmakers to prohibit the production of this evidence by the Court. And it not only shows that no such attempt has been made by the lawmakers, but states clearly that in the absence of such a provision these returns or reports are no more privileged than *other taxpayers' returns*, so far as the power of the Court is concerned, and that it was clearly erroneous for the lower Court to say that the State of Kentucky must show some United States *statute* authorizing the Collector to produce them or testify as to their contents.

A reasonably close scrutiny of the sections relied on shows that the legislative branch of the government in enacting them kept well in mind the guarding of this legislative prerogative confided to it by the framers of the Constitution.

This point does not appear to have been raised, and if raised, was evidently not well considered, in the opinions of the District Court Judges in the Huttman case and the Weeks case, referred to in the opinion of the lower court.

There is also a very great distinguishing difference between those two cases and the case at bar. In those cases the evidence was attempted to be obtained for use in criminal proceedings The present proceedings grew out of a civil action, and in this civil suit the defendants could have been compelled to testify as to any point concerning which the collector was called upon to testify. They were perfectly competent, but if they had been introduced by the plaintiff in the action it would necessarily be bound as to their credibility, which plaintiff did not, and does not care to do. Even the Hirsch case cited above arose out of State court proceedings in a case of a criminal nature; otherwise it seems to be about as analogous to the proceeding out of which this appeal grew as two cases ever get

to be, and there the petitioner was remanded to custody by the Circuit Court, and that decision was affirmed by the Circuit Court of Appeals (87 Fed. Rep., 1,005). That Appellate Circuit is the same to which the Weeks case, if taken up would have gone on appeal. It would thus appear that if the Weeks case, relied upon for the petitioner here, had been appealed, the decision of the District Judge would have been reversed.

The Hirsch case, in a nutshell, as quoted from the syllabus, reads:

" An internal revenue collector is not justified in " refusing to produce, in obedience to a subpœna " *duces tecum* issued by a State court, the applica- " tion or return made by a person who desires to " pay the tax imposed by the statutes of the United " States upon persons engaged in the retail liquor " business either by the nature of such documents " or by alleged instructions from the Commissioner " of Internal Revenue not to produce such papers " for use in evidence in the State courts."

In re Hirsch, 74 Fed., 928.

The sound reasoning of Circuit Judge Shipman on this point seems conclusive. It shows that the right of the State to such evidence, under the rules of law in the courts, cannot be controlled by any general letter of instructions to subordinates, by either the Commissioner of Internal Revenue or the Secretary of the Treasury, nor by any refusal such as was made directly by the Treasury Department in the course of these proceedings, as shown by the correspondence, copied on pages 13 and 14 of the transcript. Upon this point we quote again:

" This letter and others of like character, which " may be presumed to exist, are not the regulations " in regard to the assessment of the internal revenue " which have the force of a statute. They express " the views of an officer of the government upon " the power of the State Courts, and upon the pro- " priety of admitting this class of testimony in cases " of prosecutions for the violation of State " laws; and, while they are entitled to

" respectful consideration, they neither authori-
" tatively declare general principles, nor
" establish general rules in regard to the subject of
" obedience to the orders of a court in the matter
" of evidence. They are not general *regulations*,
" *but are instructions based upon the Commis-*
" *sioner's legal opinion of the powers of a court in*
" *a particular class of cases.*"

In re Hirsch, 74 Fed., 932.

It is true that the alleged regulation in the Hirsch case was merely a letter of instruction, addressed to a particular collector, and does not appear to have been promulgated in the form of a regulation. In the case at bar it has assumed the form of a regulation, but is nothing more nor less than a *general circular letter of instructions* in regard to matters concerning which the department was not and is not authorized to make any regulation, being merely the legal opinion of the Commissioner as to the powers of the Courts in regard to the production of evidence.

As analogous, we quote from Fleming *vs.* Stahl, 83 Fed. Rep., 943, in regard to the force of "regulations" under the civil service law:

" The only remaining question is as to whether or
" not the Civil Service regulations made by the
" Civil Service Commission and the President, and
" promulgated by the latter, can have the effect, in
" any wise, to modify, alter or change the statute.
" On that point, I content myself with the discus-
" sion of Mr. Chief Justice Cox, in Woods *v.* Gary
" *supra*, and concur in the conclusion reached by
" him, that no such power exists either in the Civil
" Service Commission, or in the President or in both
" combined. I concur also with him, in the con-
" clusion that the Civil Service law never contem-
" plated that the President, or the Commission,
" or both, could make any rule or regulation
" which could have the force or effect of law.
" True, the President may make rules and regula-
" tions administrative in their nature, which would
" govern the policy of his administration, and he
" could enforce the same by the removal of any per-
" son from office who refused to abide thereby, but

"they could not have the force and effect of law, "nor would the Courts enforce them. Such rules "and regulations are purely administrative, and "may be altered, amended or repealed by the Presi- "dent at any time or by his successor in office."

This Honorable Court has also said as to a similar regulation:

"The regulations of the department cannot have "the effect of amending the law. They may aid in "carrying the law as it exists into execution, but "they cannot change its positive provisions.

U. S. *vs.* 200 Bbls. Whisky, 95 U. S., 571.

It may, perhaps, be urged that this so called regulation of the department is a reasonable rule and relieves the department from a great deal of inconvenience and that the testimony can be gotten in the way laid down in the regulation. We have already shown by the Hirsch case that the mere fact that one is inconvenienced, or even embarrassed, by being compelled to testify in certain cases, is no reason for excusing him. The inconvenience or embarrassment is immaterial so long as the law gives the right. But it is clear from the record in this case that the question here is not as to the method of procedure, but is in regard to the absolute refusal of the department to permit the testimony to be produced *under any method*. This is clearly shown by the letter addressed to the secretary, dated August 2, 1897 (p. 13 of Transcript), and his reply thereto, dated August 13, 1897 (Transcript, p. 14). As shown by the former letter, we had, just prior to that time, filed the required affidavit in the County Court, and had moved the Court for a rule against the *Secretary of the Treasury*, requesting him to furnish the desired copies. The Secretary's reply states that he will not furnish copies of the papers desired, "even upon a rule of the Court requesting it."

The District Court record does not show it, but the

records of the County Court do show that this rule against the Secretary was refused because he was not before the Court, and was some six hundred miles beyond the jurisdiction of the Court, the Court saying in substance that it would be a mere farce to issue a rule when there was not and could not be any service of process. This also shows the unsoundness of the regulation. The rule against the *Secretary*, above referred to, must not be confounded with the rule and proceedings against the *Collector*, which was sustained.

Review of authorities cited by District Court.

The principles decided in the authorities cited by the lower Court have no application to the case at bar, and especially not to the basic principle.

The District Court, in summing up the whole matter, on pages 26 and 27 of the transcript, gives twelve reasons in support of his decision. Then, as a summing of these twelve reasons, on page 27, he says:

"The proposition underlying all the others is that "nobody can acquire any control over or right in "this class of papers belonging to the United States "in any manner except by its authority."

We have previously shown the great error committed by attempting in this manner to shift the burden from where it rightfully belongs, and this "underlying proposition" being erroneous, all the others resting upon it must be erroneous also.

A number of authorities are cited by the Court and not a single one of them has any real bearing on the case and especially as bearing on this underlying principle.

We will refer to them briefly.

Greenleaf on Evidence, Secs. 250-1, and Jones' Law of Evidence, section 780, are not applicable for the reason that the evidence sought is not of the

nature of "state secrets" or "privileged communications." United States *v.* Eliason, 16 Pet., 291, passes only upon the question of allowing pay for extra services to officers in the army, contrary to army regulations.

Hagood *v.* Southern, 117 U. S.; Cunningham *v.* Macon, &c., 109 U. S.; Carr *v.* United States, 98 U. S.; Virginia Coupon Cases, 114 U. S.; and *Ex parte* Ayers, 123 U. S., all sustain, admit and confirm the principle contended for by us, though sometimes distinguishing it, with some dissenting opinions as to some phases of it, which are hardly material to the principle bearing upon this case. Virginia Coupon Cases, 114 U. S., 290-291, perhaps announces it more clearly and it is approved and distinguished afterwards in Hagood *v.* Southern, 117 U. S., 69-70, and more notably perhaps in the later case of Ayers, 123 U. S. As we understand the principle there laid down (114 U. S., 290-291) it is beyond the power of any of the executive officers of the Government rightfully to accomplish the purpose of shielding themselves behind the Government, when attempting to act in its name contrary to the laws, and the attempt to accomplish any such thing recoils against themselves alone, as wrongdoers, whether undertaken by misapprehension as to their powers or duties or otherwise.

The United States by its laws, correctly understood and permitted to be carried out to their righteous ends, can no more decline to permit one of its constituent States to get at the facts sought to be gotten at for use as evidence for the purpose desired, than the physical body can live and refuse to allow the heart to propel the blood from it through the arteries and veins of the body to its limbs or other members forming a part of it. The principle of such a declination or refusal, carried out to its full extent, would as certainly culminate in the destruction of the body politic as would the cessation of the flowing of the

blood from the heart of the physical body result in its death and disintegration.

Ex parte Reed, 100 U. S., 23, we have already referred to as showing that a writ of *habeas corpus* cannot be made to perform the function of a writ of error, and by it thus take from a lower court the decision of questions within its jurisdiction. That was a case arising out of the reglations of the Navy Department; and the only other question decided in it was as to the force of rules and regulations of an officer in the navy. In this department the officers as well as those in the army, have to sign and subscribe to regulations after the same manner as an ordinary person might subscribe to a contract growing out of an ordinary business transaction by which he would be bound, and it was in this case that such signing of the many regulations was binding upon a paymaster's clerk, upon a decision against him by a court martial in pursuance of such regulations. The very object of requiring the men enlisting in the department of the army and navy to sign these rules and regulations is mainly, as we suppose, by the obligation thus imposed upon them with their consent, to take them out from under the very provisions of the rules of law under which others of us live, and to have their written obligations to abide by them. Having so signed and agreed why should they not be bound by them? Upon tracing the matter back through the pamphlets gotten up at the instance and for the benefit of the Internal Revenue Department, it will be seen that those having charge of it have been attempting, on these decisions growing out of precedents in cases from the Departments of the Army and Navy, to build up a kind of like precedent for the Internal Revenue Department and carry it to such extent as to claim for the regulations made by its officers the force and effect of regular laws even for those outside of it and the courts as well. Boyd *v.* U. S. has been referred to and commented upon in a former part of this brief.

The noted case of Abelman *v.* Booth, 21 How., 506, passes upon no principle involved here. The principle there decided was that a State court has no right under the law to entertain jurisdiction of *habeas corpus* proceedings to release one under trial and sentence of a United States court, after the fact of the trial or proceedings in such court is brought to its cognizance. We most cheerfully grant the supremacy of the United States Courts in such cases and insist that they, and not the executive officers of the Government, are authorized to decide what are the rules of law as to evidence, and therefore our appeal to this Honorable Court.

A part of Justice Bradley's opinion in the Siebold case, quoted in the Huttman case (70 Fed. Rep.), relied upon for the petitioner, is very pertinent in this:

"The true interest of the people of this country "requires that *both* the national and the State gov- "ernments should be allowed, without *jealous* inter- "ference on *either* side, to exercise all the powers "which respectively belong to them according to a "fair and practical construction of the Constitution. "*State rights* and the *rights of the United States* "should be *equally respected. Both are essential* "to the *preservation of our liberties* and the *per-* "*petuity* of our institutions. But in endeavoring "to vindicate the one we should not allow our zeal "to nullify or impair the other. * * * This power "to enforce its laws and to execute its functions in all "places *does not derogate from the power of the* "*State to execute its laws at the same time and* "*in the same places. The one does not exclude* "*the other*, except where both cannot be executed "at the same time" (100 U. S., 394-5).

While it may be true, as stated in argument in the Court below, and in the opinion in the Huttman or Weeks case, that the United States cannot be required to obtain evidence for the use of the State or its citizens; *yet when it has obtained it*, and has in the custody of its officers facts which will make

competent, pertinent, most exact and truthful evidence in a proceeding in which one of its constituent States is interested as a party, *can any good reason be given why* its officers, heads of departments or inferiors should be allowed to prevent its use as *evidence?* Certainly *it* can be used by *both without injury to either.* To hold otherwise places the United States Government at variance with the State governments, without reason or benefit. It, through its storekeepers, who make the reports referred to, carries the keys to the buildings which contain all the property which is claimed to be subject to State taxes (and which it does tax by the express permission of the United States), and allows no one to enter but by its consent.

Conclusion.

The facts sought as evidence appear in reports of record—easy to look at—reported upon over and over again—month by month—every month of the year—simple facts as to quantity of liquors on hand. What good reason in law, morals, or otherwise can there be why the Collector should not be permitted to testify as to such quantity on behalf of his State, for the purpose of getting at the fact for State and county taxation? We can imagine none.

What "privilege" can there be in any "communication" which Block & Sons may have made as to the amount of such liquors to the Collector of Internal Revenue, or any other person, which they are entitled to have held back from the State of Kentucky when it is seeking to have the true quantity ascertained for the purpose of imposing upon them, or upon such liquors, the same rate of taxation according to value as is imposed upon other persons having property in the State subject to taxation? Absolutely none.

The trade in this species of property costs the State for the maintenance of good government, law and order very greatly more than any other and

many, many, times more than the amount of taxes derived from it, and we insist that the United States Government should not be continued to be placed in the false position of assisting the owners of such property in hiding and concealing the true amount of it so that it may escape from regular taxation by the State on the uniform basis along with other property. That the United States Government should continue to be placed in such false position by any of its officers operates as a *quasi* fraud against the State.

The "lawful custodian" of these records is not permitted to act in the place of the judiciary and say that the disclosure of such information is "incompatible with the public interest." The custodian of a document or paper, the nature of the information in which was not and could not be so well known, might possibly in some states of case be allowed to take advantage of his government, or the State seeking information from it, for use in evidence, but such can not be the case, as to a record or report like this.

It is true, as stated (p. 20) in the opinion of the Court below that:

> "Under the law in this exceptional instance of a "distiller the property of the citizen is arbitrarily "laid hold of by the United States as soon as it is "manufactured, and is kept under its control until "the tax is paid, possibly eight years afterwards. "Meantime, these reports must be made. So far as "the information contained in these reports is ob-"tained from the distiller, it is EXTORTED for the "sole purpose of enabling the United States to as-"certain and collect from him its revenues. This "purpose is all that relieves both this act and that "of so long holding his property from being mere "tyranny,"

and this is given in the opinion as a reason why the information, merely as to the quantity of the property at a given period in each year, should not be given in evidence by the custodian of the record evi-

dencing it. This is clearly not a valid or legal reason for so withholding it. This so-called tyrannical act on the part of the United States in laying "hold of" and keeping this kind of property "under its control," and preventing the actual collection of State taxes against it possibly for eight years, until the United States tax is paid, when looked at from the standpoint of right, reason and logic is the very best of reasons why the United States, under the rules of that law, is under even the stronger obligation, to permit to be made known in evidence the information contained in its records as to the amount of it at any stated time—stronger obligation than it could be as to an any other class of property, or evidence in its possession derived in any other way.

This property "is laid hold of by the United States" only for the purpose of getting the tax due to it. It is not held after such payment is made. The delaying of the time for payment is for the benefit of the distiller only.

It seems clear to us that it is a mistake to use the words extortion or "extorted" with reference to the question of requiring the distiller also, to give the information contained in the reports from him as to the quantity of such liquors manufactured by him, when such information is sought for the purpose of taxation. Information as to mere quantity when required of the owner of property for purpose of taxation can hardly be said to be "extorted."

That these reports, whether from the distiller himself or the storekeeper in actual custody and control of the liquors and of the warehouses in which they are stored, "were exacted for the sole purpose of collecting revenue" is no right reason for taking the evidence contained in them and pertinent to any issue joined, out from under the regular rules of evidence of the common law as accepted and adjudged.

The use of the facts contained in these reports as evidence, which is all the State was seeking, does

not interfere with, abridge or render less valuable in any way the property right the United States has in them of whatever "peculiar character" it may be.

No "property" right in them is in anywise affected in these proceedings or in the proceedings in the State court.

It is desired to have merely as evidence the facts contained in the reports, as the Court below states it, "for the single quality it is supposed to have "of silently testifying upon the issues involved in "the case against Elias Block & Sons." We think the Court's "logic" is very wide of the mark when he followed up the statement with this.

"No *logic* is perceived in the possible suggestion "that that makes a difference in right, though it "may make the use more desirable in fact."

Our logic on this point is shown by calling to mind that if one desires to deprive his neighbor of any property right he has in anything, he must first compensate and obtain the neighbor's consent to part with such right; but if one's neighbor has in his possession any written document, report or papers of any kind that will show the truth as to any issue of fact in a court between one and another, one's neighbor is by the rules of law and evidence, under legal obligation to produce and exhibit it in evidence or state from it the facts as to its contents and permit an inspection thereof and a copy to be taken, for such use as evidence, when called upon as a witness to do so, and the neighbor's abstract property right in the paper or document is not thereby interfered with in any degree. This legal obligation is what government says we owe to each other that truth and right may prevail. Does a government, enforcing this rule of action between man and man, claim a different and contrary rule for itself?

The same predilection of the learned Judge of the Court below in favor of the view taken by the

bureau of the department, of which he was formerly the head, causes him to err in his logic and reasoning as to the application of the principle decided in the case of Hirsch, 74 Fed., 928. As to that case he admits and states in his opinion (p. 19):

"The learned Judge, in aid of the State Court "proceedings, seems to have held that the spirit of "Section 3240 of the Revised Statutes required a "construction that would compel internal revenue "officers to testify in all cases where the informa- "tion was sought by the State as to who were re- "tail dealers in distilled spirits."

He then proceeds to argue from such statement this rule of construction:

"If that be correct, it would seem to follow that "the same liberality of construction would, on the "other hand, require that the spirit of Section 3167 "forbids any collector to give the information de- "manded of the petitioner in cases like this; and, "indeed, the public policy of the United States "might also seem to require this construction. "That section prohibits the Collector and other in- "ternal revenue officers from disclosing certain in- "formation they acquire from visits to distilleries, "&c."

How can "the same liberality of construction" as to that section seem to require it to be held that the *mere quantity* of liquors on hand at any time should not be divulged to a court by such officer as a witness in a court proceeding to ascertain such quantity for State taxation, from which it had been wrongfully omitted, when Section 3167 referred to by him merely provides for fine and imprisonment of such officer if he

"* * * divulged to any party, or makes known "in any other manner than may be provided by "law, the operations, style of work or apparatus of "any manufacturer or producer visited by him in "the discharge of his official duties. * * *"

The bearing of this section on the distiller evidently applies only to his secrets as to *operations*,

mode of manufacture and *apparatus used* in connection with the production of the spirits. Nothing more.

Thus the law (using the word used by the learned Judge below) "prohibits" this much for the benefit, and unquestionably at the instance, of the distillers themselves. It thus appears that they themselves have sought and obtained "prohibition" to this extent for their benefit. Now it appears that these distillers, defendants in the proceedings in the State court, desire to have the ordinary common rules of law as to evidence also prohibited in proceedings by the State against them, seeking to list such property as they have wrongfully omitted from return for State taxation. We hardly believe that any great proportion or large combination of men or corporations engaged in the manufacture of such property would, openly, attempt to accomplish such prohibition of the rules of evidence to which others agree for the common good to submit themselves. They would, however, doubtless be strongly tempted to quickly avail themselves of the precedent made for them in these proceedings, if not speedily corrected.

If, however, as the learned Judge of the Court below admits to have been decided, and affirmed by the Circuit Court of Appeals for the Second Circuit,

> "the spirit of Section 3240 of the Revised Statutes "required a construction that would compel the "officers of internal revenue to testify in all cases "where information was sought by the State as to "who were retail dealers in distilled spirits,"

when the State is prosecuting criminal proceedings violative of the State laws certainly "logic" and right reason in following out this spirit of construction of the same section, instead of excusing such officers from testifying as to the mere quantity of liquors held in bond, would the *more certainly and clearly require them to testify on this point also*, inasmuch as the State is under the greater necessity to collect taxes in order to defray its ordinary

expenses in maintaining its very existence and organization.

But Section 3243 referred to by the learned Judge of the Court below (p. 25) also stands in the way of any *such* liberality of construction as the District Court below attempts to reason out for Section 3167 on page 19. It expressly recognizes such co ordinate right of taxation by the State, closing in these words: "* * * nor shall the payment of any "such tax be held to prohibit any State from plac- "ing a duty or tax on the same trade or business "for State or other purposes."

Certainly, *if any statute*, of the United States, as claimed by the District Court, in the opinion, is needed to sustain our position and right, as claimed, such right is sustained by the provisions of Secs. 721 and 914 which make the rules of the common law, &c., the rules for the United States.

The State is not, as we understand it, seeking, in the State court proceedings, to "impose duties upon a Federal officer as such," as the learned Judge of court below assumes (p. 22). It merely seeks to require sucl Federal officer to perform the duty he owes his State, as a *witness*, and imposed upon him by the rules of the law of evidence, and which he would quite likely and willingly discharge, did not his supeior officer, at the head of the bureau, under a mistaken notion of the law and his own powers under it, forbid him to discharge it. The State does not derive its right to this evidence under the rules of law from him. It merely gets the evidence through his instrumentality as a mere witness, being the custodian, as he himself says, of such reports *for* the United States. The right under the rules of law to the use, in evidence, of the facts shown by the reports is derived from the United States Government and laws. Further, the competency and admissibility of the facts as evidence being within the province of the State Court alone, it was error in the learned Judge of the District Court to allow himself, as he states

(p. 26), to have "been influenced somewhat by the "conviction that if the copies of the reports and the "desired information were obtained from the col- "lector they would be altogether inadmissible and "incompetent as evidence, and that it would be ul- "timately so held by the State Court."

This error is the more glaring in view of the fact that the learned Judge of the State Court in his opinion and judgment then in the record in the District Court (p. 7), had already passed upon this question and adjudged as follows:

"It is therefore ordered and adjudged by the "Court that the plaintiff's motions be sustained, "and that the *plaintiff is entitled to use as evi- "dence* the facts stated in the reports and papers "filed by any or all of the defendants in the office "of the collector of Internal Revenue for the Sixth "District of Kentucky, and *also such facts as are "stated in the reports* made to said office by certain "officers *known as United States storekeepers, and "any other similar records*, papers, documents, or "exemplifications in said office tending to show the "amount of liquors on hand at the distillery of the "defendants on the 15th day of September, 1889, "1890, 1891, 1893, 1894, 1895, 1896, and on the 15th "day of November, 1892; * * *."

The action we are prosecuting is for the benefit of a sovereign *constituent* State; it is a part and parcel of the United States; the action is *for taxes, without which the State cannot maintain itself*, a public matter in which all the citizens of the State are interested; the *principle* involved is of *vital* importance to *all* the States, and therefore effects the interests of the whole United States. There can be no possible doubt that the record sought as evidence is true, and will establish the truth in Court. The only possible injury (so-called) that can result to any one by the disclosure would be to the defendants in the State Court, and that is not in fact any injury to them. It could only cause them to pay what they honestly owe, if they owe anything. If they

do not owe anything, the evidence desired will be the clearest and fullest vindication that can be obtained for them.

The public and important nature of this question has impelled us to argue the matter at this length in an attempt to bring out all its phases and thus make this brief longer than we would have otherwise deemed proper.

We ask an early consideration of the appeal, in view of the public nature of the question, and a reversal of the judgment of the District Court with proper instructions as to having the appellee brought before it and remanded to the custody of the appellant or his successor as jailor of Kenton County, Ky., to be dealt with as the State Court may deem proper, in the event he continues to refuse to testify and produce the records.

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APPENDIX.

KENTUCKY STATUTES.

Assessment of Distilled Spirits.

Sec. 4105. *Distiller and bonded warehouse owner to report to Auditor.* Every owner or proprietor of a distillery bonded warehouse in which distilled spirits are stored shall, between the fifteenth day of September and the first day of October of each year, report to the Auditor of Public Accounts, in writing, sworn to by the person making the report; or, if the owner or proprietor of such warehouse be a corporation, the report shall be made and sworn to by its principal officer or manager in charge. Such report shall show the quantity and kind of spirits in such warehouses on the fifteenth day of September in the year the statement is required to be made, the dates when made, the serial number of packages in which it is contained; the county, city, town or taxing district in which the warehouse is situated; whether or not the United States Government tax has been paid thereon, if not, the date of expiration of the bonded period; the fair cash value of the spirits estimated at the price it would bring at a fair voluntary sale, and such other facts pertaining to such spirits as the Auditor may require.

Sec. 4106. *Reports to be submitted to board of valuation—who constitute—record.* That the said reports shall be, by the Auditor of Public Accounts, submitted to a board of valuation and assessment composed of the Auditor of Public Accounts, the Treasurer of the State and the Secretary of State, who are hereby constituted such board; and said board shall fix the values for the purposes of taxation under this act, and assess the same accordingly, and shall keep a record of their valuations and assessments in a book provided for that purpose, and said record shall be evidence in all courts of the proceedings of said board.

Sec. 4107. *Board to fix value—may change—action of board final.* The Auditor of Public Accounts shall file such reports with the board, which shall assess the spirits for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. The board shall at once notify the owner or proprietor of the warehouse of the amount

so fixed; and such owner or proprietor shall have thirty days, after receiving the notice. to go before the board and ask a change of the valuation, and may introduce evidence; and the board may make such changes as it may deem proper. The action of the board shall be final.

SEC. 4108. *Values certified to auditor and clerks, and furnished collecting officer.* Immediately after finally fixing such values, the board shall certify to the Auditor of Public Accounts the value of the spirits as assessed for State tax; and said officer shall certify to the county clerk of the respective counties the amount liable for county, city, town or district taxation, and the date when the bonded period will expire on such spirits. The report shall be by the county clerk filed in his office, and by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

SEC. 4109. *Custodian of spirits liable for tax lien.* Any person or corporation having the custody of such spirits on the fifteenth day of September in the year the assessment is made, shall be liable for all taxes due thereon, together with all interests and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from the day of payment.

SEC. 4110. *Tax on spirits on which government tax not paid when due—interest thereon.* Taxes on distilled spirits which may be assessed while in bonded warehouse, and on which the United States Government tax has not been paid, or will not become due before the first day of March after the assessment shall be due on the first day of March after the assessment shall be due on the first day of January, May and September next after the said government tax becomes due or be paid, or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear interest as other taxes.

SEC. 4111. *Owner or proprietor of warehouse to report and pay State tax.* Every owner or proprietor of a bonded warehouse in which distilled spirits may be stored, as contemplated in the preceding section, shall, on the first day of January, May and September next after said Government tax shall

have been paid, become due, or be removed from the warehouse, make and transmit to the Auditor of Public Accounts, and the clerk of the county court in which the spirits may have been at the time of the assessment, a statement, sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the Government tax has been paid or become due, and what spirits have been removed from the warehouse during the preceding four months; the years in which such spirits were assessed for taxation; the serial number of packages in which it is contained, and county, city, town or taxing district in which the warehouse is situated in which the spirits were stored at the time of the assessment, and shall, at the same time, pay all taxes and interest on such spirits due the State, county, taxing district, city or town to the officer entitled to receive the same.

SEC. 4112. On the failure of any owner or proprietor of any such warehouse to pay the taxes and interest, within five days after the same becomes due, he shall be deemed delinquent, and a penalty of eight per. cent. on each year's taxes due on the spirits shall attach, and the officer authorized to collect such taxes shall at once cause such proceeding to be instituted for the collection of such taxes, with interest and penalties as may be provided by law for the collection of other delinquent taxes.

SEC. 4113. *Board to assess upon failure to report.* If any warehouseman or custodian of such spirits fail to make the report as required in section four thousand one hundred and five of this article, the board shall ascertain the necessary facts therein required to be reported, and the same shall be assessed and taxes collected thereon, with interest and penalties, as though regularly reported.

SEC. 4114. *Reports—penalty for failure to make or for false report.* Every person whose duty it is to make the reports as herein required, who shall willfully fail to do so, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than five hundred nor more than one thousand dollars; and any person who shall make a false report with the intent to evade the payment of taxes shall be deemed guilty of false swearing, and, on conviction, be punished as prescribed by law for such crimes.

SEC. 535. *Punishment for disobedience.*—Disobedience of a subpœna; intentional evasion of a service of it by concealment or otherwise; concealment or removal of a minor to prevent service of a subpœna upon him, or preventing his attendance as a witness by a person having control of him; or a refusal to be sworn or to *answer as a witness*, or to subscribe an affidavit or deposition when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.

SEC. 538. *Extent of punishment for disobedience.*—The punishment for the contempt mentioned in Section 525 shall be by fine, not exceeding thirty dollars, and imprisonment, not exceeding twenty-four hours; but an officer imposing such punishment shall promptly report his action, and the reasons therefor, to the Court in which the action is pending; and the Court may vacate or modify the order of the officer, and shall render judgment for the fine imposed by the officer, or so much thereof as is approved by the Court. If a witness refuse to testify, or to be sworn, or to give a deposition, he shall be imprisoned so long as he refuses; and, if the Court finally adjourn before he submits, he shall remain in prison until the next term, or until he testifies before an officer who is authorized to take his testimony. The final disposition of the case in which he so refuses shall discharge him from imprisonment.

No. 370.
Reply Brf. of Winslows for Appt.

Office Supreme Court U. S.
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JAMES H. McKENNEY,

Filed Jan. 17, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1899.

JOHN T. BOSKE, Sheriff of Kenton County, Ky., - - Appellant,

vs. No. 17,494.

DAVID N. COMINGORE, - - - - - - - - - Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT.

HENRY M. WINSLOW,
For Appellant.

CLIFTON J. PRATT,
Atty. General.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 370.

JOHN T. BOSKE, SHERIFF OF KENTON COUNTY, KY., *Appellant*,

vs. **No. 17,484.**

DAVID N. COMINGORE, ... *Appellee.*

REPLY BRIEF ON BEHALF OF APPELLANT.

We desire to reply, in as few words as possible, to some of the points raised by the learned counsel of the appellee.

I.

AS TO RIGHT TO APPEAL FROM DISTRICT COURT DIRECT TO THE SUPREME COURT.

This right is questioned in mild form on pages 13 to 17 of brief for appellee.

The appeal is clearly authorized by the Act of March 3, 1891, quoted on pages 14 and 15 of appellee's brief. On page 15 it is clearly stated that an appeal may be taken direct to this honorable Court in cases as follows:

> "In any case that involves the construction or application of "the Constitution of the United States, and
>
> "In any case in which the constitutionality of any law of "the United States . . . is drawn in question."

Clearly each of the foregoing paragraphs authorizes this appeal to this Court. The District Court held (transcript, page 11) "that the imprisonment and detention of the relator by the respondent is in violation of the Constitution and laws of the United States." The "Petition for Appeal" (transcript, page 29) and the "Assignment of Errors" (page 20) likewise show clearly

that the construction and application of the Constitution of the United States is involved in the controversy. The constitutionality of certain laws of the United States is also involved. It seems clear, therefore, that there can be no reasonable doubt as to our right to appeal direct to this honorable Court.

II.

Amendments V and XIV to the Constitution of the United States Have No Application to the Case at Bar.

Pages 19 to 27 of brief for appellee is taken up with an attempt to show various alleged errors in the proceedings in the State Court, and counsel insists that on account of these *errors* the commitment of Comingore was without "due process of law." The errors in the proceedings in the State Court can not be revised in a *habeas corpus* proceeding, unless the court was entirely without jurisdiction in the matter. There is no question raised anywhere in this whole proceeding as to the jurisdiction of the Carroll County Court over both the person and subject matter. Assuming, therefore, that all the errors stated by appellee were made (though we will hereafter show that he is clearly mistaken as to the facts) they could not and can not be considered in this proceeding, because none of them were jurisdictional.

This point is clearly settled by the decision in *Ex parte* Reed, 10 Otto, 13-25, from which we quote as follows:

> "Here there was no defect of jurisdiction as to anything "that was done. Beyond this we need not look into the record. "Whatever was done, that the court could do under any circum- "stances, we must presume was properly done. If error was "committed in the rightful exercise of authority, we can not "correct it. A writ of *habeas corpus* can not be made to per- "form the functions of a writ of error. To warrant the dis- "charge of the petitioner the sentence under which he is held "must be, not merely erroneous and voidable, but absolutely "void. (Citing *ex parte* Kearney, 7 Wheat., 38; *ex parte* "Watkins, 3 Pet., 193; *ex parte* Milligan, 4 Wall., 2.")

And see also, for later decisions,

Ex parte Crouch, 112 U. S., 178.

Ex parte Lennon, 166 U. S., 552, in which the foregoing authorities are cited and approved.

The effort is made in the brief for appellee to show that Comingore was taken in custody solely by virtue of a writ issued by Price, the notary public, and that the notary had never certified

his action to the Court as provided by the Kentucky Code of Practice. This is not in accordance with the facts as the record itself truly shows. The attorney for the petitioner in the District Court fell into this error. Judge Evans followed in his footsteps, and now counsel for appellee brings it up in detail and presents it so plausibly that we would be almost inclined to believe it ourselves were it not for the fact that we know the contrary is true, and that the record so shows.

It is true that Comingore was imprisoned under a warrant or order from the notary, as stated in the petition and as stated by the District Judge in his opinion, but it is not true that this was the *only* process as is shown by the warrant from the notary appearing in the transcript near the close of page 9, and also shown by the response of the Sheriff (transcript, page 11) wherein he says that he detained and imprisoned the petitioner.

> ". . . Under warrant of commitment from W. A. Price, as "Notary Public for Kenton Co., Ky., of date June 27, 1899, "AND *under order and judgment of the Carroll County Court "attached thereto*, and copies of which are *hereto attached*."

By referring to the closing portion of the judgment of the Carroll County Court, it will be found that the judgment and order of the Court was made the *warrant for commitment.* The language is as follows:

> "The Clerk of the Court is ordered and directed to make out "attested copies of this judgment and order, and forward same "to the Sheriff of Kenton County, Ky., and W. A. Price, "Notary Public, as warrant and authority for the enforcement "thereof." (Printed transcript, page 8.)

Note that this pursues the same form as to warrant as was used in the celebrated Terry case, 128 U. S., 298.

All the provisions of sections 535 and 538 of the Kentucky Code (cited by appellee) were fully complied with *verbatim et literatim.* The deposition of Comingore was attempted to be taken March 1, 1899; he refused to disclose and the notary adjudged him to be in contempt; the notary then certified his action in the matter to the Court, and the Court approved his action in every particular. These facts are shown in the opinion of Judge Evans, pages 16 and 17 of record, and a part of the judgment of the Court is there copied, but that portion making the same the warrant of commitment is not quoted by Judge Evans. Afterward, to-wit, on June 27, 1899 (as shown by Judge Evans' opinion, page 18), the attorneys for plaintiff in the State Court appeared and attempted to complete the deposition and to give the witness the opportunity to purge himself of the contempt after seeing that

the Court itself had actually passed upon the question. The witness still refused and in order that continuous refusal and contempt might be made to appear of record, the notary issued his own warrant of commitment, in *addition* to the one issued by order of the Court itself, and this, TOGETHER WITH THE ONE ISSUED AND CERTIFIED UNDER THE ORDER OF THE COURT, were BOTH placed in the hands of the Sheriff and the relator was arrested and detained under BOTH WARRANTS. The warrant from the notary, and all the proceedings had before him on June 27, 1899, were purely precautionary measures. The warrant from the Court was certainly valid and the mere fact of the Sheriff having an additional writ which may or may not have been invalid, could not invalidate the valid writ or the acts done thereunder.

III.

As to Exhibits "A," "B" and "C," Attached as Part of Brief for Appellee and Referred To on Pages 29 to 33, and 40 to 48 Thereof.

It is rather strange that these forms should be brought into the matter, as they do not elucidate the questions involved. They are not the forms which, if filled out, would show the facts sought to be shown by the questions propounded to the relator when interrogated as a witness in the State Court proceedings.

The forms, the filling out of which constitute the reports as asked for in questions 3, 4 and 5, as shown on page 2 of transcript, as to the *deposit* of these liquors in bond and the *requests* made for privilege to withdraw on payment of the tax, and made by the distillers themselves, are provided for by sections 3293 and 3294 of the Revised Statutes, and are known and numbered as forms 240 and 179, respectively.

The form, the filling out of which constitutes the *reports of the storekeepers* as asked for in question 23, and as followed up in question 24 propounded to the witness (transcript, page 12), and the facts in which show only the amount of liquors on hand in the custody of the storekeeper in the warehouse at the date of the monthly reports, is provided for by Section 3301 of Revised Statutes, and is known and numbered as Form 87, pages 4, 5 and 6, of which form, made out monthly, show just the amount of liquors on deposit at the date of the report and when the liquor was manufactured and deposited in bond and how long it remained there.

Form 87 (to pages 4, 5 and 6 of which we call especial attention) is filled out by the United States storekeeper in charge thereof, from his own personal knowledge as a report to the Collector, and from the reports made on such forms the desired

facts asked for could be ascertained at a glance. They disclose nothing whatever as to the operations of the distillery or anything of that character.

We hope to be able to obtain copies of these forms to append to this brief, but if not the Court can see from the law enacted in the sections referred to that the character of their contents is necessarily as we have described it as contradistinguished from the forms filed with the brief for appellee for reports under other sections. We do not care for the reports made in pursuance of sections 3263, 3303, 3304 or 3307, as to which the argument is made in brief for appellee, and which embrace the plans and operations of the distillery, but only desire the reports made in pursuance of sections 3293, 3294 and 3301, and more especially the latter one made in what is known and numbered as Form 87, which certainly does not disclose anything as to the plans, machinery or mode of operation of the distillery, and will disclose nothing whatever that can possibly be of a secret or privileged character.

IV.

As to Section 3167, Revised Statutes, as Amended by Act of August 28, 1894.

This is referred to on pages 33 to 35 of brief for appellee.

We think appellee misconstrues this section of the statute entirely, and, in fact, he does not seem to rely very strongly thereon. The only fact that the Commonwealth desired disclosed in the State Court proceeding was the *amount* of liquors on hand at certain dates. We asked for nothing else and the documents asked for by us will disclose nothing else. The statute in no way attempts to prohibit a disclosure of the *quantity* of liquor on hand. It evidently refers to secret processes, trade secrets, particular apparatus, and other things of like nature which would have a tendency to assist one distiller to the detriment of another; even then there is nothing in the statute to prohibit a disclosure in any manner "provided by law."

On this point see *In re* Hirsch, 74 Fed., 934, cited in our original brief.

V.

As to "Regulations" Being "Laws."

Appellee insists (see brief, pages 35 to 41) that the regulations of the Treasury Department are in fact the *laws* which justified Comingore in his refusal to testify and furnish the evidence as requested.

We have fully shown on pages 23 to 30 of our original brief that said regulations are not laws; that so far as they attempt to change, alter, amend or prescribe rules for the production of evidence, they are not attempted to be authorized by any act of Congress, and to that extent do not pertain to the "assessment and collection of revenue"; that Congress has in no sense attempted to confer on the Treasury Department the power to make *laws;* that any such attempt to confer legislative authority on the Executive Department would be contrary to the plain provisions of the Constitution of the United States; and that any attempt by the Executive Department to declare the law as a *finality* would also be unconstitutional, and an encroachment upon the assumptions of the functions of the Judicial Department.

Furthermore, the authorities cited on page 37 of the brief for appellee do not at all support his view as to the effect to be given the regulations in controversy; neither does his statement as to the contents of these authorities bear out the position taken by him on the merits of the case. On page 37 he says:

> "Regulations made by the Secretary of the Treasury under "Section 251 of the Revised Statutes, *not inconsistent with law*, "and fairly within its scope and purpose, and *not infringing* "*upon any existing legal rights of individuals*, have the force "of law.
>
> "Regulations made by the Commissioner, pursuant to the "statutory authority, with the approval of the Secretary of the "Treasury, *in respect to the assessment and collection of internal* "*taxes*, have the force of statutes."

We respectfully submit that the regulation in controversy, in so far as it attempts *to prescribe the rules and fix the laws in regard to the production of evidence*, is "inconsistent with law," and is "infringing upon the existing legal rights of individuals" and other litigants, and is in no sense a regulation "in regard to the assessment and collection of internal taxes."

For these reasons the Secretary and the Commissioner have exceeded the authority conferred upon them by the statute, and therefore the regulation attempted to be applied to this case can not have the force of a statute, and much less can it be *law*.

Attention is also called to the fact that every statute conferring authority to make "regulations" has the saving clause therein that they must not be "inconsistent with *law*," and it seems to us that Congress has been so careful in using the words as to show clearly that it fully realized that the words were not synonymous, and that it was not intended to use them synonymously, but guarded carefully the constitutional limitation placed upon that body.

VI.

As to There Being no Law Which Required Comingore to Comply With the Demands Made Upon Him.

This proposition is argued on pages 48 and 49 of brief for appellee.

We respectfully submit that such a proposition is immaterial in this Court and at this stage of this proceeding. The only proper question here and now is, does the Constitution and law of the United States *forbid* the production of the testimony? This is a *habeas corpus* proceeding, and that is the only possible ground on which to base the action. The burden is on the petitioner to sustain his plea and he can not shift it.

But aside from this we deny the proposition *in toto*. It would be a mere repetition, however, to argue the point at length at this time. The authorities therefor are fully set forth in our original brief, and the State Court in a well considered opinion showed that there was an abundance of authority for requiring the production of the testimony and that opinion is copied in full in the transcript.

VII.

Control of Papers and Competency of the Evidence.

It is insisted by appellee that the Collector was not in control of the papers, and that a *subpœna duces tecum* should have been issued against the head of the Treasury Department therefor. This objection is fully met in the Hirsch case, 74 Fed., 934, where the person having the papers in actual custody was merely a *deputy* collector.

In addition to this we suggest that a subpœna issued from a State court of Kentucky, and served some six hundred miles beyond the jurisdiction of the court, would be of little force or effect. It would in all probability cause some amusement, and could be treated with absolute contempt without fear of serious consequences.

The Assistant Attorney General in his brief, page 49, makes another suggestion, as follows:

> "I have been unable after considerable research to find a "single case where a copy of a paper certified by a Collector of "Internal Revenue has been held to be competent testimony in "a judicial trial."

Not waiving the point as to this being a question purely and solely for the State Court and in no wise proper in this inquiry,

we suggest for his information that there is a statute in Kentucky fully covering the point. It reads as follows:

"1636. *Public records of other States or United States.* "All records and exemplifications of office books kept in any "public office of the United States, or of a sister State, *not* "*appertaining to a court*, shall be evidence in this State if "attested by the *keeper* of such record or books, and the seal of "his office, if there be a seal."—(Kentucky Statutes, Ed. 1894, Section 1636.)

Furthermore, while we can find no decision using the word "collector" therein, the principle is fully and clearly announced by this honorable Court in Evanston vs. Gunn, 9 Otto, 666-7, and in White vs. United States, 164 U. S., 100, both of which are cited in our original brief, page 15.

VIII.

As to the Reports or Documents Being Privileged.

This is referred to in the brief of the Assistant Attorney General, pages 50 and 53.

On this point we call particular attention to the language used by Judge Shipman in his opinion in the Hirsch case, 74 Fed., 934. It is clear, forcible and conclusive, and reads as follows:

"It is next said that these returns are *privileged.* It is "*probable* that a *statute* could declare that communications of "*tax payers* to a board of assessors or officers of similar char- "acter should be privileged, and that no returns can be exam- "ined by any one, or be reached for examination by legal "process. The thirty-fourth section of the Act of August 27, "1894, which endeavored to make income tax returns entirely "free from examination or inspection by unauthorized persons, "*did not go so far as to say that they could not be subject to* "*examination by courts, but declared their freedom from exam-* "*ination 'except as provided by law.' In the absence of such* "*provisions the returns now in question are no more privileged* "*than other tax payers' returns, in the sense that they must be* "*kept secret, and cannot be produced for the purpose of evidence* "*in a legal proceeding by order of court.*"

The thirty-fourth section of the Act of August 27, 1894, (referred to above by Judge Shipman) is an amendment to Section 3167 of the Revised Statutes, which is the only *statute* relied on by appellee for prohibiting the production of the testimony in question.

IX.

As to Conflict Between the Hirsch Case and the Cases of Huttman and of Weeks.

It is conceded by both parties to this controversy that there is a conflict of opinion in these cases.

The Huttman case and the Weeks case are both decisions of District Courts. The Hirsch case (74 Fed., 934), in an opinion from the Circuit Court in which the points involved are elaborately discussed, and that decision was appealed to the Circuit Court of Appeals, and there duly affirmed (87 Fed., 1005.) The question seems to narrow itself down as to whether or not this Court will follow the two District Courts, or will it follow the two higher Courts. Circuit Judge Shipman's views are certainly in harmony with the common law, and the law of Kentucky, and the Constitution and laws of the Uuited States; while the opinions rendered in the Huttman and Weeks cases seem to us to be in conflict with every sort of law, and are certainly in harmony with no law, unless the "regulations" are held to be laws, which hardly seems possible in view of the Constitution. We observe that the learned Assistant Attorney General does not attempt to refute the argument presented as to the unconstitutionality of any law attempting to authorize the Executive Department to amend, alter or repeal law.

We also call attention to the fact that we present even a stronger case than the Hirsch case, because that was a criminal case, just as the Huttman and Weeks cases were, while the present controversy is in a *civil* case, as was adjudged by the District Court itself, and as has been conceded all through the controversy.

X.

As to the Inconvenience of the Rule of Law Contended for by Appellant.

Appellee argues this point with seeming earnestness on the closing page of his brief. His argument is fully answered by Judge Shipman in the Hirsch case, but we are not compelled to rely on that case alone on this point, for this honorable Court has spoken thereon, as follows:

"The argument of inconvenience has been pressed upon us "with great earnestness. But where the law is clear, this "argument can be of no avail; and it will probably be found "that there are also serious inconveniences on the other side. "Wherever power is lodged it may be abused. But this forms "no solid objection against its exercise. Confidence must be

"reposed somewhere; and if there should be an abuse, it will "be a public grievance, for which a remedy may be applied by "the Legislature, and is not to be devised by courts of justice. "This argument was also used in the case already cited, and the "answer of the Court to it is so satisfactory that *it would be* "*useless to attempt any further refutation.*" *Ex parte* Kearney, 7 Wheat., 45.

But we deny that there will be any great inconvenience to the Department, for when the distillers learn that this honorable Court will not sanction their frauds on the State, they will pay their taxes without further controversy.

We most respectfully ask a reversal with instructions as asked in our original brief.

HENRY M. WINSLOW,
For Appellant.

CLIFTON J. PRATT,
Atty. General.

WINSLOW & WINSLOW,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN T. BOSKE, SHERIFF OF KENTON County, Ky., appellant,
v.
DAVID N. COMINGORE, APPELLEE.
No. 370.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This case is here upon an appeal from the decision of the United States district court for the district of Kentucky, rendered in chambers in said district on the 5th day of July, 1899, in a habeas corpus proceeding in which David N. Comingore was the petitioner and John T. Boske the respondent. Comingore, the appellee, was at the time and is now the collector of internal revenue of the United States for the sixth district of Kentucky, and Boske, the appellant, is sheriff of Kenton County, Ky.

Sections 4241 and 4258 of the code of Kentucky are as follows:

SECTION 4241. *Sheriff or auditor's agent to list property omitted.—Summons against owner.—Trial. —Penalty.*—It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description of the property proposed to be assessed and the value of the corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years (days) after the filing of such statement the clerk of the court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county; if not, then to his agent, attorney, or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if

not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment either party may appeal, as in any other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment for taxation. If the court shall decide that the property is liable to assessment, the clerk of the county court shall certify to the auditor of public accounts and the sheriff a description of the property and the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of taxes due and cost of assessment except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As a compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments, the names of the persons against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment (see further sec. 4258).

SECTION 4258. Auditor may appoint and remove agent in each county. The auditor of public accounts may appoint an agent in each county of this Commonwealth. This agent shall hold his office

and be removed at the pleasure of the auditor (see further, as to duties, sec. 4241, transcript, p. 1).

It appears that a proceeding was instituted under section 4241 in Carroll County court in the name of the *Commonwealth of Kentucky, plaintiff*, v. *Elias Block & Sons, defendants*, the allegation being that the said Block & Sons, who were distillers of spirits from grain, had failed to list for taxation certain distilled spirits belonging to them which were then actually in, or had been in, the bonded warehouse of said distillers at their distillery and which, under the laws of Kentucky, was liable to assessment for State taxes, the object of the said proceeding being to list the said spirits for taxation under the provisions of the section above quoted. The plaintiff in the case, in order to obtain testimony as to the existence of the spirits, served notice on David N. Comingore, who is the collector of internal revenue for the Sixth Kentucky district, that his deposition would be taken before W. A. Price, a notary public of Kenton County, Ky., in the city of Covington, in said county, on the 1st day of March, 1899. Comingore appeared before the notary on the day designated and after having been sworn as a witness the taking of his deposition was proceeded with. In the course of the examination the witness was asked the following questions, and gave answers thereto as severally set forth (record, p. 2):

3. Did the defendants, Block & Sons, owners of said distillery, make, under the provisions of the laws of the United States, reports to your office as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on said distillery premises from the year 1887 down to

the present time? If so, how often under the provisions of the law do they make such reports?

A. They make reports monthly.

4. Did they, under the provisions of said law, also make applications to your office during said time for permission to withdraw such liquors from bond? If so, how often?

A. They make applications whenever withdrawals are made; daily if they choose.

5. Are these reports of deposits and requests for privilege to withdraw, or official records made therefrom, now in your office, or under your control in any way, for the period commencing October 1, 1885, and ending July 1, 1897?

A. They are on the files of this office, but not under my control, except as collector.

6. Please file official copies of them and make them a part of your deposition.

A. I will have to decline to do this under section 3167 of the Revised Statutes of the United States and the rulings of the Department.

7. What rulings of the Department do you refer to other than section 3167 of the statutes?

A. The ruling of the Department is as follows: "The Department does not permit the giving out of anything contained in internal-revenue returns or documents by a collector, storekeeper, or any other officer of a collection district for purposes other than those which the statutes of the United States contemplate."

8. Who made that ruling of the Department?

A. It is made by the Secretary of the Treasury, through the Internal Revenue Commissioner.

Upon the refusal of Comingore to file official copies of the reports which are referred to in his examination, Price, the notary, adjudged him in contempt of court

and of the said notary public for the said failure and refusal to file said copies and make them a part of his deposition, and the notary further adjudged that the Commonwealth of Kentucky then and there recover of Comingore the sum of $5 as a fine, and that he be taken by the sheriff of Kenton County and confined in the jail of said county for the space of six hours or until he was willing to furnish such copies or permit access to the records of his office, in order that information might be obtained to be used as evidence in the case against Block & Sons. The notary made report of his action in adjudging Comingore guilty of contempt to the Carroll County court, and on the 3d day of April, 1899, the said county court made and entered an order approving the judgment and action of said notary. The following is the said order of the county court (beginning on p. 7 of the record):

> It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the sixth district of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 15th day of September, 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892; it is further ordered that the witness, D. N. Comingore, make or cause to be made, or permit the plaintiff, its agent, or attorneys to make, true

copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agents or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky. It is further adjudged that the action of the notary public, Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents, and exemplifications or to testify as to their contents, as requested, be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of $5 as a fine, and that he be taken by the sheriff of Kenton County, Ky., and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows:

Please file official copies of the reports made to your office by Block & Son as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond.

Also with the following request:

Please file official copies of such reports of the United States storekeepers as show the liquors on

hand at the warehouses on the distillery premises of the defendants in Carroll County on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, 1894, 1895, and 1896.

To all of which the defendants except.

The clerk of the court is ordered and directed to make out attested copies of this judgment and order, and forward same to the sheriff of Kenton County, Ky., and W. A. Price, notary public, as warrant and authority for the enforcement thereof, to which the defendants also except.

After the entering of this order by the county court, to wit, on June 27, 1899, the attorney for the Commonwealth of Kentucky who appeared in the proceeding on the part of the Commonwealth against Block & Sons, in company with Price, the notary public, went to the office of the collector of internal revenue at Covington, Ky., and Comingore, the collector, being present, the said attorney, in the presence of Price, the notary public, propounded to Comingore the following question:

I call your attention to the opinion of the court rendered April 3, 1899, copy of which has been furnished you and as to which you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as show the amount of liquor on hand at the warehouses of the defendants on their distillery premises in Carroll County, Ky., on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, September 15, 1894, and September 15, 1895, and September 15, 1896, or allow us on behalf of the plaintiff in this action access to and inspection of

> such records or papers for the purpose of taking copies for use on behalf of the plaintiff as evidence in this action.

To which Comingore made the following answer:

> I will have to decline, just as I did in the other case, and for the same reason as given in the other case.

Thereupon Comingore was again adjudged by Notary Price to be in contempt of the said county court and of W. A. Price, a notary public, and further, that the Commonwealth of Kentucky recover of Comingore the sum of $5 as a fine, and that he be taken by the sheriff or some constable of Kenton County and be confined in the jail of said county for the space of six hours, or until he should signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as collector of internal revenue of the United States for the sixth district of Kentucky, or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of the *Commonwealth of Kentucky* v. *Block & Sons* in said county court. And the said Price then and there issued and delivered to the said John T. Boske, sheriff of Kenton County, Ky., a written order of commitment. The sheriff took Comingore in custody by virtue of the order delivered to him by Price, the notary, and it was while in custody under this process that Comingore filed his petition before Judge Evans, of the district of Kentucky, for the writ of habeas corpus. Boske, the sheriff, made return to the writ of habeas corpus which was

served upon him and produced the body of Comingore before Judge Evans in response to the mandate of said writ. Upon investigation of the case, Judge Evans discharged the prisoner from custody, at the same time delivering an opinion upon the matters involved in the case, which opinion is fully set forth in the record.

From this judgment of the district court, John T. Boske, the sheriff, prayed an appeal to the Supreme Court of the United States, and this is how the case is brought here for review by this court.

When Boske produced Comingore, his prisoner, before Judge Evans in response to the mandate of the writ of habeas corpus, he made a written return upon the writ, which will be found in the record, beginning on page 11 and ending on page 15. The said return, which is somewhat lengthy, is simply a rehearsal of the proceedings which had been taken before the notary and the county court, with the addition of correspondence between the Secretary of the Treasury of the United States and the attorneys representing the Commonwealth of Kentucky, together with legal propositions which are contended for by the appellant in this case. When the district judge had rendered his decision in the habeas corpus proceeding, a bill of exceptions on the part of the respondent, Boske, was signed and filed (record, p. 28), and is as follows:

> Be it remembered that on the 5th day of July, 1899, on the calling of the above-entitled matter for trial, the attorneys for the respondent offered and introduced as a witness Maxwell S. Barker, and avowed that they would prove by him the following facts: That he, while acting as State auditor's agent

for Jefferson County, Ky., had obtained from collectors of internal revenue the information shown by their records, documents, and reports as to the amount of liquors in store in the bonded warehouses and the times and amount of withdrawals of liquors from bond, when he had the consent of the distiller or distillers as to whose product the information was sought, and offered to amend the return or response to the writ accordingly; to which evidence and motion the relator, by attorney, objected, and the court sustained the objections and refused to allow said motion or the introduction of such testimony on the trial, even if true, on the ground that it was immaterial and wholly irrelevant; to which ruling of the court the respondent, by attorney, excepted, and time to and including July 8 was given to prepare and file his bill of exceptions, and this bill of exceptions is hereby affirmed, allowed, and settled and made part of the record herein.

WALTER EVANS, *Judge.*

Thereupon the attorneys for the respondent filed the following assignments of error (record, p. 30):

Comes now the respondent, John T. Boske, sheriff of Kenton County, Ky., and filed the following assignment of errors, upon which for himself and the Commonwealth of Kentucky he will rely in the prosecution of the appeal from the decision and judgment rendered by this honorable court on the 5th day of July, 1899, in the above-entitled matter:

1. That the said court erred in rendering the decision and judgment in the said matter against the respondent, acting as sheriff for and on behalf of said Commonwealth of Kentucky, as shown by him in his return to the writ issued herein against him, and in deciding that the imprisonment and detention

of the relator by the respondent was in violation of the Constitution and laws of the United States, and in discharging the prisoner from custody, and in rendering judgment against this respondent for costs, and that said judgment and decision is contrary to law and the facts, as stated in the pleadings in said matter.

2. That the said court erred in refusing to permit the introduction of the testimony of the witness Maxwell S. Barker, as follows: That he, while acting as State auditor's agent for Jefferson County, Ky., had obtained from collectors of internal revenue the information shown by their records, documents, and reports as to the amount of liquors stored in the bonded warehouses and the times and amount of withdrawals of liquors from bond, when he had the consent of the distillers as to whose product the information was sought, and the offer made in connection therewith to amend respondent's return to the writ.

3. That the court erred in not rendering a decision dismissing the petition, discharging the writ, and remanding the prisoner to the custody of respondent as sheriff aforesaid.

Wherefore respondent and appellant prays that the decision and judgment of said court be reversed and such directions given that full force and efficacy may be allowed to the process and writs of the Commonwealth of Kentucky by reason of the defense set up in the return and response to the writ issued against him herein, and for all proper relief.

WINSLOW & WINSLOW,
Attorneys for John T. Boske, Sheriff Kenton County, and Commonwealth of Kentucky.

ARGUMENT.

I.

Before reaching the questions involved in this appeal, which are based upon the exception taken at the hearing below and the assignments of error, the court may take under consideration the question as to whether or not an appeal in this case directly from the district court to the Supreme Court will lie.

Anterior to the circuit court of appeals act, appeals in cases like this were regulated by the provisions of sections 763 and 764 of the Revised Statutes, which said sections read as follows:

> SEC. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the case is heard.
>
> 1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.
>
> 2. In the case of any prisoner who, being a subject or citizen of a foreign State, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.
>
> SEC. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court

in the cases described in the last clause of the preceding section.

It will be seen that, under the law as it then stood, no appeal to the Supreme Court was allowed from the district court to the Supreme Court, but such appeals were from the district court to the circuit court of the district in which the case was heard, and from the final decision of the circuit court an appeal was authorized to the Supreme Court in the classes of cases described in the last clause of section 763.

So, then, if there had been no change in the law, the appeal in this case should have been taken from the decision of the district court to the circuit court of the district. The law relative to appeals, however, is changed by the act to establish circuit courts of appeals, etc., approved March 3, 1891 (26 Stat., 826). The portion of the last-mentioned act relating to appeals and writs of error will be found in sections 4, 5, and 6, which are as follows:

> SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals

hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital crime (as amended by act of January 20, 1897).

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review in such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely

upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

The appellate jurisdiction, therefore, formerly exercised by the circuit courts under section 763 of the Revised Statutes, is now by the said sections 4, 5, and 6 of the act of March 3, 1891, transferred to the circuit courts of appeals, except in certain cases in which appeals direct to the Supreme Court are allowed. In the case at bar the appeal is taken from the final decision of a court inferior to the circuit court upon a writ of habeas corpus and in a case in which it was alleged that a person (Comingore) was restrained of his liberty in violation of the Constitution of the United States. This is one of the cases, therefore, described in the first paragraph, taken together with subdivision 1 of section 763 of the Revised Statutes of the United States; and, as before suggested, the appeal from the district court, under the law as it existed before the circuit court of appeals act went into effect, could only have been taken to the circuit court of the district in which the case was heard.

The only question that remains, then, is as to whether this case comes within any one or more of the classes of cases in which, under the provisions of the circuit court of appeals act, an appeal may be taken from the district court direct to the Supreme Court.

When we look at the bill of exceptions (Record, p. 28), and the assignments of error (Record, p. 30), there does not appear to be any question raised which would authorize the appeal.

But I do not intend to do more than merely call the attention of the court to the statutes governing appeals and the record in this case, and therefore will not pursue the point further.

II.

The appellant raises the question of the jurisdiction of the district court for the first time in his brief. There is nothing in the record which even intimates that the authority of the district court to issue the writ of habeas corpus in this case and to proceed to a hearing thereon was questioned in the court below. On the other hand, as before stated and shown by the record, the return by appellant on the writ set up the right to hold Comingore in custody by virtue of the contempt proceeding and that alone, and the only exception taken at the hearing was to the refusal of the court to hear testimony offered by the respondent tending to show that it had been the custom of certain internal-revenue officers theretofore to furnish such information as was being sought by the examination of Comingore. Having failed to question the jurisdiction of the court upon the return of the writ or upon the hearing in the district court, and thus make the issue as to the jurisdiction and have that question alone certified to the Supreme Court as required by the second paragraph of section 5 of the circuit court of appeals act, the appellant is in no position now to raise the question of jurisdiction here.

If, however, the question of jurisdiction is before the court, I insist that the district court for the district of Kentucky had ample power to issue the writ of habeas corpus in this case, and, upon the return thereof with the body of the petitioner, to proceed to investigate the cause of his caption and detention and to discharge him. The facts upon which the petition for the writ was based

were that Comingore was collector of internal revenue for the sixth Kentucky district; that he had been called before a notary public in order that his deposition might be taken to be used as evidence in behalf of the plaintiff in a case between the Commonwealth of Kentucky as plaintiff and Block & Sons, defendants, pending in the county court of the county of Carroll, Kentucky; that when Comingore was being examined it was demanded of him that he produce official copies of certain reports which he stated he had in his custody as collector of internal revenue and which had been made by Block & Sons, distillers, in reference to the operations of the distillery of the said Block & Sons, and also as to the distilled spirits deposited in their bonded warehouse; that the collector, Comingore, refused to furnish such official copies, and placed his refusal on the ground that he was forbidden so to do by a statute of the United States and also by regulations of the Treasury Department issued in pursuance of and in the execution of the internal-revenue laws of the United States. For this refusal proceedings in contempt were taken against Comingore, and he was adjudged to pay a fine and be imprisoned and to remain in prison until he should either furnish the official copies demanded or permit the notary or others to enter the collector's office and make an examination with a view to obtaining the information desired; and it was under this proceeding that he was in the custody of Boske, the sheriff of Kenton County, Ky.

It is contended, therefore, that Comingore was in custody in violation of the Constitution and laws of the

United States and that the act done by him was in pursuance of a law of the United States, and that under the provisions of section 753 of the Revised Statutes he was entitled to the writ of habeas corpus. If, however, it should be held that the act done by Comingore was not in pursuance of a law of the United States, I submit that he was in custody in violation of the Constitution of the United States, because of the fact that he was being deprived of his liberty without due process of law (Amendment V, Constitution of the United States. Amendment XIV, Constitution, section 1.)

It will be observed by perusing the record of the proceedings which were taken by Price, the notary, that at his first sitting to take the deposition of Comingore, which was on the 1st of March, 1899, he adjudged Comingore guilty of contempt because of his refusal to furnish the official copies of documents or papers demanded, and ordered that the Commonwealth of Kentucky recover of Comingore $5 and that he be imprisoned for the space of six hours, or until he was willing to furnish copies or permit access to the records. Price reported this action to Carroll County court, and thereupon the county court made an order on the 3d day of April, 1899 (which order is copied heretofore in the statement of the case, and which will be found in the record, beginning on page 5 and ending on page 8), in which the said court rendered judgment in accordance with the report of the notary.

Subsequent to this action of the county court, to wit, on the 27th of June, 1899, Price, the notary, in company with a lawyer, appeared at the office of Comingore, the collector, in Covington, Ky., and called the collector's

attention to the opinion of the court rendered April 3, 1899, and again demanded of the collector that he file the official copies of the reports made by distillers relative to the liquor in the warehouses of Block & Sons on their distillery premises in Carroll County, Ky., on September 15, 1890; September 15, 1891; November 15, 1892; September 15, 1893; September 15, 1894; September 15, 1895, and September 15, 1896, or that the notary and the lawyer be allowed access to and inspection of the records and papers in the collector's office, for the purpose of taking copies thereof for use on behalf of the plaintiff as evidence in the case of the *Commonwealth of Kentucky* v. *Block & Sons*. Comingore stated to the notary and the attorney that he would have to decline as he had theretofore done and for the same reasons (Record, pp. 3 and 4), and thereupon Comingore was by the said notary again adjudged to be in contempt of said county court, and it was further adjudged by the notary that the Commonwealth of Kentucky recover from Comingore the sum of $5 as a fine, and that he be taken by the sheriff or some constable of Kenton County and confined in the jail of said county for the space of six hours, or until he should signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as collector of internal revenue of the United States for the sixth district of Kentucky, or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of the *Commonwealth of Kentucky* v. *Block & Sons* in said county court, *and the said W. A. Price*

then and there issued and delivered to the said John T. Boske, sheriff of Kenton County, Ky., a written order of commitment (Record, p. 4), and it was by virtue of this written order of commitment issued by Price on the 27th day of June, 1899, that Boske took Comingore into custody and was holding him at the time he applied for the writ of habeas corpus.

The statutes of the State of Kentucky applicable to the question which I am about to present are sections 535 and 538 of the Kentucky Code, 1895, and are as follows:

> § 535 (*595*) *Witness may be punished for contempt.* Disobedience of a subpœna; intentional evasion of a service of it, by concealment or otherwise; concealment or removal of a minor to prevent service of a subpœna upon him, or preventing his attendance as a witness, by a person having control of him; or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.
>
> § 538 (*598, 599*) *Punishment imposed for contempt.* The punishment for the contempt mentioned in section five hundred and thirty-five shall be by fine not exceeding thirty dollars, and imprisonment not exceeding twenty-four hours; but an officer imposing such punishment shall promptly report his action, and the reasons therefor, to the court in which the action is pending; and the court may vacate or modify the order of the officer, and shall render judgment for the fine imposed by the officer, or so much thereof as is approved by the court. If a witness refuse to testify, or to be sworn, or to give

> a deposition, he shall be imprisoned so long as he refuses; and if the court finally adjourns before he submits, he shall remain in prison until the next term, or until he testifies before an officer who is authorized to take his testimony. The final disposition of the case in which he so refuses shall discharge him from imprisonment.

I call the attention of the court particularly to the manner of proceeding provided in these statutes by which a witness before an officer engaged in taking depositions may be punished for contempt. Such officer has no authority to take final action or to issue any process to enforce a judgment punishing for contempt. The extent of the officer's power is, in case a witness has been guilty of a contempt as described in section 535, to so adjudge and to pronounce his judgment for fine and imprisonment. But this action is not final, nor is it enforceable. There is still another requirement in order to make the judgment effective, and that is *that the officer shall promptly report his action, and the reasons therefor, to the court in which the action is pending; and the court may vacate or modify the order of the officer, and shall render judgment for the fine imposed by the officer, or so much thereof as is approved by the court.*

Thus it will be seen that the judgment which is final and which can be carried into execution is not the judgment of the officer taking the deposition, but the judgment of the county court in which the action is pending. In this case, Price, the notary, reported his action taken on the 1st of March, 1899, when Comingore was before him as a witness, to the Carroll County court, in which

the suit of the *Commonwealth of Kentucky* v. *Block & Sons* was pending. The county court thereupon entered the order above referred to. In order to carry this final judgment of the county court into execution, the process should have been issued from that court. But no such process was issued. It does not even appear from the record that Price, the notary, had a certified copy of the judgment of the county court when he went in company with the lawyer to the office of Comingore on the 27th of June, 1899. He certainly had no order of the county court directing the punishment imposed upon Comingore to go into execution, nor was there any process directed to the sheriff or any other officer requiring him to take Comingore into custody. Therefore, it can not be held that Boske, the sheriff, took Comingore into custody by virtue of the judgment of Carroll County court, for the reason that the sheriff had no process in his hands from the court which authorized him to arrest Comingore and detain him in his custody; and if it is insisted that Comingore was in custody by virtue of the judgment of Carroll County court, he was then being deprived of his liberty without due process of law.

Further than this, it will be observed that when Price, the notary, visited the office of Comingore in Covington on the 27th of June, 1899, upon Comingore's refusal to comply with the demands made upon him at that time, Price proceeded again to adjudge Comingore guilty of contempt, and ordered him to pay a fine of $5 and to be imprisoned for six hours or until he should comply with the request, and without making any report at all of this action to the Carroll County court where the suit was

pending, he proceeded to write and deliver to the sheriff a commitment, as follows (Exhibit C, Record, p. 9):

The Commonwealth of Kentucky to the Sheriff or any Constable of Kenton County:

D. N. Comingore, being examined as a witness by deposition before me, as a notary public, for the purpose of using his testimony on the trial of a certain action pending in the Carroll County court, in which the Commonwealth of Kentucky is plaintiff and Louis T. Block et al. are defendants, and having been adjudged guilty of contempt of said court in refusing to answer certain questions then asked him and to give information as to the amount of distilled liquors in the custody of the defendants in said action at certain times, as shown from the records, documents, and reports on file in his office and under his control as collector of internal revenue for the United States for the sixth district of Kentucky, or to allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action, as shown by certified copies of the order and judgment of said court hereto attached as part hereof, as well as the action had and recorded by me in the taking of said depositions:

These are, therefore, to command you to take the body of the said D. N. Comingore, and him safely keep or confine him in the jail of Kenton County for the space of six hours and until he shall satisfy the Commonwealth of Kentucky the sum of $5.00 adjudged against him for contempt or until he shall signify his willingness to purge himself of the said contempt and testify and give information from the records and documents under his control and in his custody as collector, as aforesaid, and how you shall have executed this writ you will make known to me at my office, in Covington, Ky., or the judge of the

Carroll County court, at his office, at Carrollton, Carroll County, Kentucky, and with such return produce this writ.

Witness my hand and seal of office as notary public for Kenton County, Kentucky, this 27th day of June, 1899.

[SEAL.] W. A. PRICE, *N. P., Ky.*

And it was by virtue of this commitment that the sheriff then and there took Comingore into his custody and was holding him at the time the writ of habeas corpus was issued by the district judge. In this connection I call attention to the record in reference to the action of Price on the 27th of June, 1899, which will be found in the petition for habeas corpus in paragraph 5, beginning on page 3 of the record.

The commitment issued by Price, the notary, in obedience to which Boske arrested Comingore and took him into custody, was without authority of law. Price, although a notary public of Kenton County, in the State Kentucky, was not authorized to issue process to carry into execution a judgment of Carroll County court, nor could he make a judgment in contempt final and issue process to enforce it.

So, then, we may consider the case in either view.

If it was intended to arrest Comingore for the first instance in which he had been adjudged guilty of contempt, there was no process, from the court which made the judgment final, which authorized any officer to take him into custody. And if the commitment was in consequence of the second action of Price, the notary, then there was no judgment for contempt, because the law says that it is not

a judgment until the action of the officer is reported to the court in which suit is pending and the judgment approved there. Therefore, in either case there was no due process of law in the hands of the officer under which Comingore could be arrested and held in custody, and hence he was being restrained of his liberty without due process of law.

If Comingore had not been a Federal officer he would have been entitled to relief from such an arrest through the instrumentality of the writ of habeas corpus issued by a Federal judge. But the circumstances surrounding Comingore present even a stronger case. He was collector of internal revenue, in the discharge of his official duties; he was acting in pursuance of a law of the United States and in obedience to regulations issued by the Secretary of the Treasury for the government of collectors in the conduct of official duties; and for having taken such action he was arrested by a sheriff under a commitment unlawfully issued by a notary public. Will anyone seriously contend that this is not a case in which a Federal judge could afford relief by writ of habeas corpus, not only to Comingore as a citizen, but to him as an officer of the United States engaged in the proper discharge of the duties of his office?

The appellant in his brief takes the position (though apparently without much confidence) that Comingore should have sought relief by appeal to the higher courts of the State of Kentucky. It is true that a State court is under the same high obligation to support, construe, and give effect to the Constitution of the United States

that a Federal court is. But if it does not do so the Federal courts have jurisdiction, and they may in any stage of the case exercise their discretion and release on habeas corpus anyone who is in custody under State authority in violation of the Constitution or laws of the United States. (Church on Habeas Corpus, § 84, p. 129, and authorities cited in note 3.)

In the same work, section and note just cited, it is said:

> The right of appeal, while enforcing one's rights in the State courts is often an expensive, slow, and inadequate remedy, and he ought not to be made to suffer the expense, delay, and uncertainty of the rulings in the State courts, where he clearly shows that his imprisonment, though under State process, is in violation of the Constitution of the United States;

in support of this principle citing *Ex parte Kieffer* (40 Fed. Rep., 399); *In re Reinitz* (39 Fed. Rep., 204); also *In re Christensen* (43 Fed. Rep., 243); *In re Wan Yin* (10 Sawy., 532; 22 Fed. Rep., 701).

In the last case cited it is well said that—

> The Supreme Court is too far away, and the way there is too expensive, to furnish relief in the great majority of cases, either upon a direct application or an appeal from the State court.

I refer also to the case *In re Neagle* (135 U. S., 1) as direct authority upon the question involved in this case. The decision in that case is so familiar to the court that I do not deem it necessary to go further than to say that it settles definitely the principle that a person who is in custody for an act done in pursuance of a law of the United States, or is in custody in violation of the laws

or Constitution of the United States, has the right by writ of habeas corpus to be brought before any court of the United States, or justice or judge thereof, for the purpose of an inquiry into the cause of his detention.

III.

I now come to the consideration of the principal question in controversy, and that is as to whether the plaintiff in the proceedings in Carroll County court, Kentucky, the case of the *Commonwealth of Kentucky* v. *Elias Block & Sons*, brought under the Kentucky statute hereinbefore set out, could by law require the collector of internal revenue to furnish the information demanded of him to be used as evidence in the said proceeding. In other words, has the said court the right to compel the collector of internal revenue to produce the records and papers of his office, such as are referred to in this case, to be used as evidence in a suit pending in such court?

In order that the court may fully understand the character of reports required under the regulations of the Treasury Department in the administration of the internal-revenue laws in connection with the business of distillers, both by officers and the distillers themselves, I have caused some of the blank forms adopted and used for this purpose to be attached to this brief and marked respectively "A," "B," and "C." It is true that these forms are no part of the record and they do not appear in the statement of facts; but being those prepared and used under the regulations promulgated for the more effectual assessment and collection of taxes under the

internal-revenue laws, I do not consider it improper to submit them to the court for consideration in passing upon the question involved.

The paper marked "A" is numbered 88 and is, as will be seen, the blank required to be used by the Government storekeeper assigned to a distillery in making his monthly report of materials used, mash or beer produced, and spirits warehoused at the distillery which is being operated under the supervision of such storekeeper.

The paper marked "B" is numbered 88½ and is the form on which the storekeeper makes his report of the time of filling and emptying fermenting tubs, etc., at the distillery.

The paper marked "C" is numbered 59 and is the form used by the gauger in making report of spirits deposited in the warehouse.

There are other forms on which reports are required to be made by officers having in charge distilleries and distillery warehouses, but I have given sufficient of them to show to the court the character of these reports, the information which they contain, and the purposes for which they are required.

In connection with these reports I call the attention of the court to section 3263, Revised Statutes, which is as follows:

> SEC. 3263. Every distiller and person intending to engage in the business of a distiller shall, previous to the approval of his bond, cause to be made, under the direction of the collector of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler,

worm tub, and receiving cistern, the course and construction of all fixed pipes used or to be used in the distillery, and of every branch and every cock or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which any such pipe leads or with which it communicates; also the number and location and cubic contents of every still, mash tub, and fermenting tub, the cubic contents of every receiving cistern, and the color of each fixed pipe, as required in this Title. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery, and two copies shall be furnished to the collector of the district, one of which shall be kept by him, and the other transmitted to the Commissioner of Internal Revenue. The accuracy of every such plan and description shall be verified by the collector, the draughtsman, and the distiller; and no alteration shall be made in such distillery without the consent, in writing, of the collector. Any alteration so made shall be shown on the original, or by a supplemental plan and description, and a reference thereto noted on the original, as the collector may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

The survey made under the provisions of this section gives in minute detail a description of the distillery, its machinery, apparatus, pipes, joints, the size, location, and capacity of the fermenting tubs and receiving cisterns. In other words, it contains in full the plan of the distillery, its method of operation, and capacity for production of distilled spirits. Two copies of the plan and description thus made are furnished to the collector of the district, one of which is kept by him and the other trans-

mitted to the Commissioner of Internal Revenue. A third copy of the survey is required to be kept displayed in the distillery. The object of this last requirement is obvious. It is not to give the public an opportunity to learn the facts which the survey contains, but it is to have it inside the distillery so that an officer visiting the distillery and one who has legal authority to enter and examine the same can compare the apparatus, operations, and product with the plan and description and ascertain if the business is being conducted properly and in accordance with the survey. Within the distillery is not a public place, but the private property of the owner, and the right to enter is confined to the Government officers and the owner and his employees.

I have adverted to section 3263, however, more particularly to point to the fact that the report of survey is on file with the collector of the district, and is as much a record of his office as the reports made by the storekeepers, gaugers and distillers. If, therefore, a State court can compel the production of the latter to be used as evidence in behalf of a party to a suit pending in such court, it can also compel the production of the survey or plan and description of the distillery for the same purpose. If the State court has such power, the collector of internal revenue, who is the custodian, by virtue of his office, of all these reports, can be made to disclose the contents of any and all of them, and thus be the means of giving to the public every detail of the business and operations of a distiller, including the construction, capacity, and daily work of the distillery. In

other words, under a subpœna duces tecum the collector of internal revenue could be forced to produce in a State court these reports, and thus permit any litigant, together with his attorneys, the court, the jury, and the bystanders, to pry into the plans and operations of any distillery which was being conducted under Government supervision. I find in section 3167, Revised Statutes (as amended by act of August 28, 1894), this provision:

> That it shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, * * * and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office and be incapable thereafter of holding any office under the Government.

It may be urged that the collector himself does not visit the distilleries in person, and, therefore, is not included within the provisions of the above statute. But to insist upon this position seems to me would be sticking in the bark. The purpose of the statute undoubtedly was to prevent officers who had the right to go into the manufacturing or producing establishments of persons who are operating under the internal revenue laws from disclosing the result of their examinations and making

known to outside parties the construction, plans, and the manner of operation of such establishments. The information which comes to the collector concerning the distilleries through the reports which are made to him, is derived through his subordinates, the internal revenue officers of the United States on duty in his district. It would seem to be idle to undertake to give this statute the effect that Congress must have intended, by interpreting it to mean that the subordinate officers and employees in the revenue service would be guilty of a crime if they divulged the information referred to in the statute, and yet leave the collector free to do the very thing that such subordinates are forbidden to do. The deputy collectors and revenue agents who visit distilleries do so for the purpose of assisting the collector in the discharge of his official duties, in order to make known to him whether such establishments are being conducted in accordance with the law and whether the product is being faithfully accounted for to the extent that it is manufactured. The storekeeper is assigned to the distillery and remains there really as the representative of the collector, in order to have continual supervision on the part of the Government over the operations; and the gauger is simply an additional agency through which the internal revenue taxes are to be assessed and collected.

Therefore, I insist that the provisions of section 3167 are as much applicable to the collector himself as to the other officers and employees included therein, and that a fair construction of this statute would make the collector

of internal revenue guilty of a misdemeanor if he should divulge to any person the operations, style of work, or apparatus of any distillery, the information concerning the same having come to him through the reports rendered by other officers of the internal-revenue service acting under such collector.

But I do not rely on section 3167 as the only authority for the action of the collector in refusing to comply with the demand for the reports in his possession. As will be seen, he was acting in compliance with the express terms of the following regulations (Record, pp. 23 and 24):

> TREASURY DEPARTMENT,
> OFFICE OF THE COMMISSIONER
> OF INTERNAL REVENUE,
> *Washington, D. C., April 15, 1898.*
>
> The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the regulations, series 7, No. 12, revised August 3, 1896:
>
> All records in the offices of collectors of internal revenue or any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose.
>
> Collectors are hereby prohibited from giving out any special-tax records or any copies thereof to private persons, or to local officers, or to produce such records or copies thereof in a State court, whether in answer to *subpœnas duces tecum* or otherwise.
>
> Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called

for, on the ground of being prohibited therefrom by the regulations of this Department.

The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted.

As to any other records than those relating to special-tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in Rule X of the rules and regulations of the Treasury Department, namely:

In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary requesting the same.

Whenever such rule of the court shall have been obtained, collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury, with a request for its authentication, under the seal of the Department, and transmission to the judge of the court calling for it, unless it

should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such copy.

N. B. SCOTT,
Commissioner.

Approved:
L. J. GAGE,
Secretary of the Treasury.

The question then arises as to whether or not the Commissioner of Internal Revenue had the right to make these regulations, and if, when they were approved by the Secretary of the Treasury, they became effective and afforded protection to officers of the internal revenue who obeyed them.

Regulations made by the Secretary of the Treasury under section 251 of the Revised Statutes, not inconsistent with law and fairly within its scope and purpose, and not infringing upon any existing legal rights of individuals, have the force of law. (*United States* v. *Hutton*, 10 Ben. (Dist. Court Rep.), 268; 15 Opin., 128.)

Regulations made by the Commissioner, pursuant to the statutory authority, with the approval of the Secretary of the Treasury, in respect to the assessment and collection of internal taxes, have the force of statutes. (*In re Huttman*, 70 Fed. Rep., 699; *In re Weeks*, 82 Fed. Rep., 729. See also *Gratiot* v. *United States*, 4 How., 80; *Ex parte Reed*, 100 U. S., 13; *United States* v. *Barrows*, 1 Abb. U. S. Rep., 351; *United States* v. *Eliason*, 16 Pet., 304.)

When the Secretary of the Treasury, over his official signature, approved these regulations, they became regu-

lations of the Treasury Department. Section 161 of the Revised Statutes of the United States is as follows:

> The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

And in section 251 of the Revised Statutes will be found this provision:

> The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss; he shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws.

The internal-revenue bureau being a bureau of the Treasury Department, the Secretary, who is the head of the Department, has authority under section 161 to prescribe regulations, not inconsistent with law, for the conduct of the officers of the Department, for the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property

appertaining to it. The regulations before set forth were prescribed for the conduct of officers of the internal revenue in dealing with certain papers and reports which come into their possession and custody in the administration of the internal-revenue laws and in assessing and collecting the taxes under the provisions of these laws.

Section 251 goes further and empowers the Secretary of the Treasury *to make and issue from time to time instructions and regulations pertaining to the forms of entries, oaths, bonds, and other papers, and rules and regulations to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws.*

Following these is section 321 of the Revised Statutes which contains this provision:

> The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal-revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue.

It can not be disputed that under these statutes the Secretary of the Treasury, and the Commissioner of Internal Revenue under his direction, have full authority to make and issue such rules and regulations as are necessary or expedient in carrying out the purposes of the internal-revenue laws, provided such regulations and rules are consistent with the law. Then it may be considered as to whether or not the regulations set out before

are consistent with the law. The forms upon which reports are made of the operations of manufacturing establishments under the internal-revenue laws are all prescribed and distributed to the various officers in the internal-revenue service by the Commissioner of Internal Revenue. This is done, as the law requires, under the direction of the Secretary of the Treasury. These forms, as will be seen by reference to those which I have attached for the information of the court as part of this brief, contain various items of information which is useful only to those having in charge the enforcement of the internal-revenue laws, and together with other forms, including those prescribed for the reports to be made by distillers, are a part and parcel of the system adopted for the more effectual enforcement of the internal-revenue laws. This system is in accordance with the requirements of the internal-revenue laws, and regulations made in pursuance thereof by the Commissioner of Internal Revenue, under the direction and with the approval of the Secretary of the Treasury. The reports not only inform the chief officers with great particularity and in minute detail of the daily operations of manufacturing establishments where articles subject to internal taxes are produced, but they also contain information which can be made the basis of ascertaining as to whether the operators of such manufacturing establishments are violating the criminal laws of the United States. For instance, these reports made in connection with distilleries of spirituous liquors in their order give the measurement, character, and capacity of the distillery; then follow the reports of the daily operations, includ-

ing material of all kinds used in distillation, and, finally, the gauger's return of spirits in the warehouse as gauged and reported on the form marked "C." There is scarcely a stage in the process of distillation from the time that a distillery is constructed and is ready for operation until the packages are stamped in the warehouse and removed and sold that the distiller can not be guilty of some act of omission or commission for which he can be held criminally liable, and in the event of a prosecution these reports would furnish important data and information to the prosecuting officers. I contend, therefore, that the forms provided are such as a due enforcement of the internal-revenue laws authorize and require, and that they are forms which are consistent with the due execution of the said laws, and this being the case it is entirely consistent with the law that the Secretary of the Treasury, and the Commissioner of Internal Revenue under his direction, may make regulations as to the use of these forms, the reports sent up thereon, and as to the disposition of such reports at the hands of officers having them in custody.

So far in the discussion of the character of reports made concerning the operation of distillery establishments, I have considered those which are required of the officers of the Government, and the exhibits I attach are a part of the blank forms used by such officers. I have pursued this line in order to put the court in full possession of the method by which the assessing and collecting officers of the Government under the internal-revenue laws are kept advised from time to time from an official source of the operations of distilleries.

I now come to the reports made by the owner or operator of the distillery, as it was these reports made by Block & Sons, the owners of a distillery, which the plaintiff in the case pending in Carroll County court desired to have produced as evidence, and it was particularly as to these that official copies were demanded from the collector, or that he permit access to his office in order that they might be examined. The law under which reports are made by the owner or operator of a distillery will be found in sections 3303, 3304, and 3307 of the Revised Statutes, which are as follows:

> SEC. 3303. Every person who makes or distills spirits, or owns any still, boiler, or other vessel used for the purpose of distilling spirits, or who has such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or who uses any such still, boiler, or other vessel, shall from day to day make, or cause to be made, in a book or books, to be kept by him in such form as the Commissioner of Internal Revenue shall prescribe, a true and exact entry of the kind of materials, and the quantity in pounds, bushels, or gallons purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased, the amount paid for ice or water for use in the distillery, the repairs placed on said distillery or distilling apparatus, the cost thereof, and by whom and when made, and of the name and residence of each person employed in or about the distillery, and in what capacity employed. And in another book he shall make like entry of the quantity of grain or other material used for the production of spirits, the time of day when any yeast

or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity, and temperature at the hour of twelve meridian; also, of the time when any fermenting tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold.

SEC. 3304. The books of every distiller hereinbefore required shall always be kept at the distillery and be always open to the inspection of any revenue officer, and, when filled up, shall be preserved by the distiller for a period of not less than two years thereafter, and whenever required shall be produced for the inspection of any revenue officer.

SEC. 3307. On the first day of each month, or within five days thereafter, every distiller shall render to the collector of the district an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced and placed in warehouse. And the distiller or the principal manager of the distillery shall make and subscribe the following oath, to be attached to said return:

"I, ——— ———, distiller (or principal manager, as the case may be) of the distillery at ———, do solemnly swear that since the date of the last

return of the business of said distillery, dated —— day of ——— to ——— day of ———, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine gallons and proof gallons of spirits; and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials respectively hereinbefore specified, and no more."

One of the said duplicate returns shall be transmitted by the collector to the Commissioner of Internal Revenue.

Under section 3303 the owner or operator of a distillery is required to keep certain books, *the forms of which are prescribed by the Commissioner of Internal Revenue.* By reading this section it will be seen that the entries which the distiller is required to make in these books contain information of every detail in carrying on the business. The kind and amount of materials used, the quantity purchased, from whom and when purchased, by what kind of conveyance delivered, and the amount paid therefor; even the amount of fuel purchased and from whom, the amount paid for water and ice for use in the distillery, the repairs placed on the distillery or distilling apparatus, the cost thereof and by whom and when made, and the name and residence of each person employed in or about the distillery, and in what capacity employed. Not only is the quantity of grain or other material used at the distillery to be entered in these books, but the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermenta-

tion, the quantity of mash in each tub, the number of the tub, the size of the tub, the proportion of the tub which is filled with mash or beer, the gravity and temperature of the beer, etc., are to be entered.

Under section 3307, the distiller is required on the first day of each month, or within five days thereafter, to render to the collector of the district an account in duplicate taken from these books, and this return, or account, as it is called in the statute, is required to be made upon the oath of the distiller in the form prescribed in the said section. In other words, this return is nothing more nor less than an exact copy or reproduction of the entries made in the books required to be kept under section 3303, sworn to by the distiller.

What are known as withdrawals or entries for withdrawal are simply applications made by the distiller to the collector to pay the tax on spirits in the warehouse and withdraw the same for sale or consumption. These entries are made under the provisions of section 3294 of the Revised Statutes as amended by section 5, act of March 1, 1879, and section 5, act of May 28, 1880 (21 Stat., 145; see Compilation Internal Revenue Laws, 1894, p. 121). The entry is a description of the casks or packages to be withdrawn, and when made in the prescribed form and the tax paid on the spirits contained in the casks or packages, the collector issues his order to the storekeeper in charge of the warehouse for the delivery.

I think that in the foregoing I have presented to the court the law and the system adopted thereunder for the conduct of a distillery for the production of distilled

spirits from the survey which precedes the commencement of operations to the payment of the tax on the product and the withdrawal of the same from the warehouse. If I have gone too much into detail or become tiresome in presenting this part of the subject, my explanation is my desire that the court should see that the reports and accounts in the possession of the collector sent in by both officers and distillers are a part of the same system, adopted under the law, and carried into effect by regulations, consistent with the purposes of the law, issued by the Secretary of the Treasury, or by the Commissioner of Internal Revenue under the direction or with the approval of the Secretary.

The reports of the operations of a distillery made by the officer in charge and those made by the distiller are substantially the same. Now, the distiller makes his reports from the entries in the books kept by him under section 3303. These books are the originals, and the reports copies. If the plaintiff in the suit in the State court is entitled to have the contents of these books to be used as evidence, the originals are the best evidence, and the production of these should have been sought, and not the production of the copies in the custody of the collector. The books are in the possession of the distiller not only during the time in which the entries are being made, but when filled up such books are by section 3304 of the Revised Statutes, above quoted, required to be preserved for at least two years. If, therefore, these books are competent as testimony, why is it that Block was not subpenaed to produce them? Why did the plaintiff in the suit seek to utilize mere

copies, when the books themselves are the first and best evidence of what they contain, and are the property of the defendant and in his possession? I can account for this on no other ground than that it was an effort to circumvent the principle declared in *Boyd* v. *United States* (116 U. S., 616).

These books are the private property of the distiller. It is true that the law requires him to produce them for the inspection of revenue officers; but aside from this the public has no more right to these books, or to their contents, than any other private paper belonging to the distiller.

As before stated, the suit in Carroll County, Ky., was a proceeding to subject Block & Sons to the payment of taxes upon property alleged to have been unlisted—not only to the payment of taxes, *but also to the payment of a penalty of 20 per cent on the amount of such taxes as might be found to be due.* So, then, the proposition is to require Block to furnish from his books, kept by him in the course of his distilling operations, evidence not only of his failure to list his property for taxation, but evidence upon which he may be punished for such failure by being subjected to the payment of a penalty pronounced by the statute (section 4241, Code of Kentucky). Not only this. I assume that if Block, in making his return of property liable to taxation under the State laws of Kentucky, knowingly and willfully made a false return upon his oath, he would be indictable for perjury, and this evidence which is sought would therefore not only tend to make him liable for taxes and inflict upon him a penalty, but would also tend

to fasten upon him the crime of perjury. Under these conditions I insist that in the case pending in the State court of Kentucky Block could not have been compelled by a subpœna duces tecum or otherwise to produce these books to be used as evidence against him; and I contend that this position is in harmony with the principle decided in Boyd's case, where the effort was to compel the production of private papers of a claimant to be used as evidence upon which to secure a forfeiture of his property. Then, if the plaintiff in the Kentucky case was not entitled to have the books themselves, can it be held that he was entitled to the benefit of the contents of the books obtained from copies which Block had sent to the collector in response to a law of the United States which required him to do so?

Having treated of the subject in its relation to the distiller and his rights, I now come to consider it in the broader light of the rights of the Government of the United States.

To begin with, there is no law which required Comingore as collector to comply with the demand which was made upon him to file official copies of papers which he had in his custody as collector, to be used as evidence in any suit or proceeding pending in a court. The records, documents, and papers in the office of a collector of internal revenue belong to the Treasury Department of the United States, because the collector is an officer of that Department. The collector has no control of such documents and papers, except to preserve tl em and use them in the transaction of the business of his office. If at any time the Secretary of the Treasury or the Commissioner

of Internal Revenue should call for one of these documents or papers to be transferred from the collector's custody to the Department at Washington, it would have to go; and if the plaintiff in the Kentucky suit was entitled to the benefit of the contents of the reports which we have been considering, the only way in which he could obtain an official copy is under the provisions of section 882 of the Revised Statutes, which reads as follows:

> SEC. 882. Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.

But if the reports themselves were to be used this could be secured by a subpœna duces tecum to the head of the Treasury Department, or someone under his direction, who would produce the original papers themselves in court for introduction as evidence in the trial of the cause.

I have been unable, after considerable research, to find a single case where a copy of a paper certified by a collector of internal revenue has been held to be competent testimony in a judicial trial.

It will be observed by reading the record, page 2, that no demand was made upon Comingore for the production of the original papers; it was only required of him that he file official copies and make them a part of his deposition.

However, I do not intend to hinge my case upon this point, which may be regarded as technical, but I take

the position that a State court can not by its process compel an officer of the United States having in his custody reports or returns such as are involved in this case to produce them to be used as testimony for or against a party to a suit in a State court. These reports are the property of the United States. They are Federal papers. They are a species of communications from the subordinate officers of the United States and persons operating manufacturing establishments in which taxable articles are produced to the taxing authorities of the United States, in order that the internal-revenue taxes of the United States may be properly assessed and collected.

The regulations made and issued by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which are set out hereinbefore, are consistent with the purposes of the law. The object of the regulations were in furtherance of the orderly and efficient execution of the law, and therefore they have the force of law.

But, for the sake of the argument, assume that no such regulations had been issued—or that it should be held that they were inconsistent with the law—I maintain that these reports and communications from the subordinate officers and the distillers are privileged. They contain matter of a confidential character between officers of the United States and persons operating establishments for the production of taxable articles under the direction and supervision of such officers, and contain information which is intended exclusively for use in the administration of the internal-revenue laws. It would be against public policy and detrimental to the public interests to require the pro-

duction of such papers or communications as evidence in a controversy between individuals or in suits in the State courts. In this connection I call attention again to 15th Opinions of the Attorney-General, page 378, and the discussion of this subject by Attorney-General Devens and the authorities cited by him; also *In re Weeks*, heretofore cited, and quote from the opinion the following:

> The Federal Government can not dictate as to evidence in State courts, but it can not be required to provide evidence for them; and the State has no right to Federal instruments of purely Federal character for proof, unless they are left within its reach, and these are not, but are put without that reach. (82 F. R., 732.)

In reading the opinion from which this is taken, it will be readily understood what the learned judge meant when he said that these instruments were put beyond the reach of the State courts. He was referring to the existence of a regulation which he held to have the force of law and which directed that revenue officers should not produce as testimony such instruments.

I may say here, by way of parenthesis, that this opinion is upon a state of facts similar to that in the *Hirsch Case* (74 Fed. Rep., 928), and the decision directly in conflict with that in the said case. The Hirsch case is relied upon largely by the appellant in his brief to sustain the position that the plaintiff in the suit in the Kentucky court is entitled to have the reports for use as evidence. But even if the principle declared in the Hirsch case is the law, which I do not admit, it does not, I think, interfere with the position which I have taken relative to the reports or instruments involved in

this controversy. The question in the Hirsch case was as to the right of a State court of Connecticut to require Hirsch, who was a deputy collector of internal revenue, to produce, in obedience to a subpœna duces tecum, the application of one Cole to pay the special tax and have a license from the United States to retail spirituous liquors within said State. Cole was indicted in Connecticut for a violation of the retail liquor laws, and the paper sought was intended for use on his trial as evidence against him. Shipman, C. J., in the opinion in this case, says with reference to the question (p. 930):

> These applications are not of a private or secret character, because, under section 3240 of the Revised Statutes, each collector of internal revenue is required to keep conspicuously in his office, for public inspection, an alphabetical list of all persons who shall have paid special taxes within his district, and to state therein the time, place, and business for which such special taxes have been paid.

And further (p. 931):

> No regulation upon the subject now under examination is contained in the printed book of general regulations which has been issued for the guidance of internal-revenue officers.

Thus it will be seen that the fact that by section 3240 of the Revised Statutes the names of retail dealers licensed by the United States were required to be made public by being posted in a conspicuous place in the collector's office is one ground upon which Judge Shipman bases his opinion, and the reason assigned by him is that this required publication takes away the private or secret character of the instrument and that to have it produced as evidence is no

invasion of the private affairs or interests of the United States.

As a further basis of his conclusion, Judge Shipman says that there is no regulation forbidding the production of these applications by the revenue officers having them in custody, which I construe to mean that if there had been such a regulation the learned judge would have held it to have the force of law and to be sufficient to authorize the officer to decline to produce the papers.

The facts in our case differ from the facts in the Hirsch case in the two important particulars suggested in the opinion in the latter; for there is no law requiring the publication of any of the reports sought as evidence in this case, and in addition there is a positive regulation issued by the proper authority which forbids the officers to produce them as evidence in the State courts.

The opinion of District Judge Evans, who issued the writ of habeas corpus in this case and discharged Comingore, is given in full in the record, commencing on page 16. I call the attention of the court here particularly to the line of reasoning in this opinion and the authorities cited to support the decision. I regard the opinion as a cogent presentation of the law governing the question under consideration, supported by citations of authority fully sustaining the conclusion arrived at. For the convenience of the court I here reproduce the opinion, leaving out such portions of it as would be a reiteration of matter heretofore set forth in this brief, the points of such omission being indicated:

* * * * *

> There is no dispute about the facts, though it may be doubted whether the petitioner's imprisonment

was not wholly unauthorized upon the ground that the notary public had no power under the Kentucky Code to issue the process under which the arrest was actually made (sections 535, 538, Civil Code). But the court will not pass upon that point, inasmuch as all parties desire that there shall be a judicial determination of the very important and interesting questions involved, namely: Was it the duty of the collector of internal revenue to answer the questions propounded, and to give the information or furnish the official copies demanded of him, and has the State of Kentucky, as a litigant in a civil action in her own court, the right to exact it of that officer in such a case?

A question somewhat kindred to these has been passed upon by three different Federal courts. All of the cases, however, were different from this in two important particulars: First, that the information in each of them was desired in aid of the criminal laws of the States in regard to the occupation of retailing distilled spirits, as to which some of the facts are required to be made public by section 3240 of the Revised Statutes of the United States; and, second, the latest regulation bearing on the subject had not then been promulgated.

In the case of Hirsch (74 Fed. Rep., 928), Circuit Judge Shipman, of Connecticut, in an elaborate opinion, held that the collector should be compelled to testify. His opinion seems even to go to the extent of holding that the Treasury Department has no authority of law for making a regulation that would prevent it. The learned judge, in aid of the State court proceeding, seems to have held that the spirit of section 3240 of the Revised Statutes required a construction that would compel internal-revenue officers to testify in all cases where information was sought by the State as to who were retail

dealers in distilled spirits. If that be correct, it would seem to follow that the same liberality of construction would, on the other hand, require it to be held that the spirit of section 3167 forbids any collector to give the information demanded of the petitioner in cases like this; and, indeed, the public policy of the United States might seem also to require this construction. That section prohibits the collector and other internal-revenue officers from disclosing certain information they acquire from visits to distilleries, etc.

In a somewhat earlier case, *In re Hultman* (70 Fed. Rep., 701), Judge Williams, of the district of Arkansas, sitting by designation in Kansas, had expressed views exactly contrary to the Hirsch case, though this fact does not seem at that time to have come to the notice of Judge Shipman.

In the latest case, *In re Weeks* (82 Fed. Rep., 729), Judge Wheeler, of the district of Vermont, held with Judge Williams that the collector was not required to answer.

This conflict of authority seems to make necessary, or at least appropriate, a further examination of the whole subject.

It should not be, and I think never is, the purpose or desire of the Federal tribunals to interfere with any of the legitimate functions of the State courts or officers. Indeed, the leaning will be in the other direction. Judicial proceedings, Federal and State, are essential to the good order of society and to the protection of the rights of the individual citizen. Those proceedings would often prove abortive if the courts had not the most extensive powers as well as full authority to compel witnesses to testify to facts within their knowledge, and indeed to produce papers under their individual

control in proper cases. This general proposition is certainly true, notwithstanding there are many exceptions to it, notably such as pertain to privileged communications, incompetent testimony, testimony that would tend to degrade the witness or subject him to criminal prosecution, and such as is forbidden by public policy.

In this case if the petitioner had been called to testify only as to facts within his personal knowledge, no law would exempt him from that duty if what he knew was competent testimony and its admission was not forbidden by other rules. It is not claimed that any of the information desired at his hands is within his personal knowledge. It is all contained in certain reports made to him by the distillers and by other United States officers and which are in his possession in his official capacity as an officer of the United States.

As it is clear that they are not his private property, it is essential to accurately ascertain the nature of those reports and his relations to them and his duties respecting them.

In order to obtain money for the support of the Government, Congress has passed laws for the collection of the revenue to be derived from internal sources. A complete system has been established. It is placed under the Treasury Department. The Secretary of the Treasury is its head. It is operated through the Bureau of Internal Revenue, at the head of which is the Commissioner. The entire system is under his supervision, but subject to the control of the Secretary of the Treasury.

Section 3301, Revised Statutes, provides that every storekeeper shall on the first Monday of every month make a report to the collector of the quantity of distilled spirits in the warehouse in his

charge, and section 3307 requires that the distiller shall monthly make and swear to a report substantially similar.

These reports thus made to the collector in the course of administering the laws of the United States, and for this executive purpose alone, are now demanded of him by the State officials in the manner before shown.

Under the law in the exceptional instance of a distiller the property of the citizen is arbitrarily laid hold of by the United States as soon as it is manufactured and is kept under its control until the tax is paid, possibly eight years afterwards. Meantime these reports must be made. So far as the information contained in the reports is obtained from the distiller, it is extorted for the sole purpose of enabling the United States to ascertain and collect from him its revenues. This purpose is all that relieves both this act and that of so long holding his property from being mere tyranny. The information derived from these reports is not obtained for publication in any manner; it is entirely official. Under this state of fact it does not seem to the court that these reports are in any sense records open to the use of the public. They are the property of the United States in the custody of its officers. They were exacted for the sole purpose of collecting revenue. It is true that they are property of a peculiar character, but that does not alter the fact. Property is defined as being the exclusive right of control and dominion over a thing and may include anything that is subject to ownership. Public records and documents are such as are placed on the public files for the use or information of the public, to which the public has access and of which the public has the right, usually upon payment of certain fees, to demand copies. They

are not property in any ordinary sense. In many cases copies of the public records of the United States may be authenticated by the head of the department or other ultimate custodian. Familiar instances of such public records are those in judicial proceedings and where documents are required to be registered or recorded, patents for land, and many others. (See *Boyden* v. *Burke*, 14 Howard, 575.)

But there is no statute or law of the United States which authorizes or permits the collector of internal revenue to make or to certify for use by anyone else copies of the reports which have been gathered for particular governmental purposes.

The United States has not authorized the use of these executive documents by anybody for any purpose except the official one for which the reports were made. No statute is shown which gives the litigant in this case any right to claim the use of this property—the private property of the United States—for any purpose whatever. The petitioner is the immediate custodian thereof under the control of his superior officers. They have forbidden him to put this property of the United States to the uses required by the litigant in the State court, and yet the petitioner is arrested for obeying the orders of his superior officers respecting private papers of the Government in which the State of Kentucky has no interest whatever and over which it has no more lawful control than it has over any other property of the United States. The purpose for which the litigant desires this property can not affect the question of its right to it. It would not be contended that the State of Kentucky had any right to claim this property or its use except for the single quality it is supposed to have of silently testifying upon the issues involved in the case against Elias Block &

Sons. No logic is perceived in the possible suggestion that that makes a difference in right, though it may make the use more desirable in fact.

The State, except so far as it may be given by statute, has no right over the property or the archives of the United States Government.

No statute is shown to justify the claim now made, though a statute is necessary to make the claim good. No sovereign can claim or obtain the right to demand the use of the archives or quasi-private documents of another sovereign without its consent expressly given, and public policy forbids that any attempt to extort such use should be encouraged. Most unseemly, not to say dangerous, consequences might otherwise ensue.

The State, while it may compel the petitioner as a mere individual to tell what he may know in that capacity, has no power to control him as an officer nor to regulate the conduct of his official duties with reference to these reports nor their contents, as those duties can only be fixed by the laws of the United States and the orders and regulations of his superior officers.

Among the official duties thus prescribed for the petitioner in the conduct of his office and respecting the care of the property of the United States committed to his custody is that which requires that he shall not do with it what is demanded at his hands in this case.

It may be assumed to be clear that a State statute can not impose duties upon a Federal officer as such, much less can a State court do so. The attempt to do it in this case through the medium of a process of contempt must fail, because the State shows no statutory right thus to appropriate the property of the United States nor to impose a duty upon its officers. If it were otherwise and if the officers of the

United States in the discharge of their duties could be interfered with by State courts or officers, it might soon produce a state of affairs that would be intolerable. It might, for example, take much of their time or put them to great expense. If the State courts could for this purpose appropriate this property or could compel official copies to be made or official information to be compiled, where would the line be drawn, and *vice versa*, if the Federal authorities or courts could interfere with the duties of State officers, except in those cases expressly authorized by the supreme law of the land, or necessary to carry into effect the laws of the United States or to enforce the judgments of her tribunals. There is no law of the United States which would give the Federal authorities power over the property of a State except occasionally through the writ of *ad quod damnum* and through the exercise of the right of eminent domain.

While these views are believed to be correct as to mere property as distinguished from true public records, as above defined, it probably might not be held that Federal courts, on the one hand, and State courts upon the other, were incompetent to compel custodians of public records either to give copies lawfully demanded upon payment of fees or else to attend with the records in proper cases under a *subpœna duces tecum*. But this would be upon the ground that they are records to which all the public has the right of access. The right, however, if held to exist, would not extend to another class of papers which the State might own and which pertained to the conduct of its government and which its policy has not opened to the public. For example, in the early case of *Morris* v. *Creel* (2 Virginia Cases, 49) it was held that a paper submitted to the

executive council of Virginia for the purpose of enabling it to perform its executive functions ought not to be withdrawn by the clerk without the order of the council, and therefore no attachment should be awarded against the clerk for refusing to obey a *subpœna duces tecum* commanding him to produce the paper to be read in evidence.

Every paper in the custody of public officers is not a public record. Some, as in this case, may be mere papers belonging to the United States as documents pertaining to the administrative affairs of the United States and as mere property which the United States has obtained for its mere executive purposes and over which, through its proper agents and officers, it has exclusive control, and which the State can not demand for purposes of testimony or otherwise, contrary to regulations made under the authority of the Federal statutes.

It is altogether correct to say that neither the Secretary of the Treasury alone nor the Commissioner of Internal Revenue, with his approval, can make regulations having the force of law unless authorized to do so by Congressional enactment, but it is also believed to be true that sections 161, 251, and 321 together are ample to authorize the making of the regulations hereinafter set forth. They contain provisions as follows:

By section 161, "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

By section 251 it is provided: "The Secretary of the Treasury shall prescribe rules and regulations

not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, and give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law;" and

By section 321, that "the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

At all events, the following regulations were made, namely:

* * * * *

(See regulation heretofore copied.)

Now, as against persons desiring to use the property of the United States, these statutes should be liberally construed to preserve that property, and no third person has any right to gainsay it. He has no interest in the property. At all events, it is believed that the statutes and regulations constitute a binding rule for collectors of internal revenue in their control of the Government property entrusted to their care sufficient to justify them in rendering obedience to their chief, especially as against all outside persons, and also sufficient to excuse them for refusing to permit anybody to use or to get the benefit of that property who does not show some positive law of the United States as a basis of a demand for it.

Here the State of Kentucky is a litigant only in a civil suit, and it may well be supposed that the

general principle that when a government abandons its sovereignty and becomes a private litigant it is subject to ordinary rules should have some application, but whether so or not the court is convinced that the State can manifest no right to the papers asked for, except by means of some statutory enactment bestowing it or through some act of courtesy, as distinguished from a right, on the part of the lawful custodian.

It is an old rule that one government will not aid another in enforcing its revenue laws. Whether it should be applied to the operations of our State and National Governments need not, in the abstract, be considered. Certain it is, however, that no law of the State can be found which is intended to aid the National Government in the collection of its revenue, nor can any be found in the statutes of the United States which was intended to assist the States. Whether comity would require such enactments on the part of both need not be considered. The fact remains that such legislation has not been regarded as at all needful or desirable. The United States has a complete revenue system of its own, and equally so has the State. They are and must necessarily be entirely independent of each other, though, in some respects, notably in the matter of taxing the occupation of a retail dealer in distilled spirits, the statutes of the United States make it plain that by taxing the occupation it is by no means meant to authorize such occupation contrary to local laws. It only intends to tax the occupation if it is in fact carried on, but does not authorize it to be carried on. This is the basis of the provisions of section 3240 as well as 3243 of the Revised Statutes, and it should not be overlooked that while, by the regulations above given, the Treasury officials

undertake to control the use of the reports referred to, they do not undertake altogether to deprive litigants of their use as testimony, except so far as the lawful custodian thereof regards it as incompatible with the public interest. While he has the right and the power altogether to exclude others from all use of such property, yet, under certain circumstances, as matter of courtesy, copies of the papers will be furnished. Surely the owner of property or his sole agent may annex conditions to a grant of the use of it.

Indeed there might be many considerations of public policy to support that course in case of merely executive or administrative papers like these—considerations affecting both the amount and safety of the revenue.

Nor is the State of Kentucky powerless. It has its own independent and complete system for taxing distilled spirits. True, the power of the United States is supreme to the extent of having the first right, but the statutes of the State (sections 4105 to 4114, inclusive, Kentucky Statutes) provide ample machinery for compelling reports from distillers, and, indeed, everything else necessary for the purpose. The State has neither occasion nor right to call upon the United States nor her officers for reports made under the administration of its laws in order to enforce the collection of the State revenue, nor would the United States have the right to call upon the State. Each government must take care of its own concerns in such matters, and it is much doubted by the court whether the Commonwealth of Kentucky or the government thereof in any way really makes or desires to make this claim, although her name is used in the suit in the Carroll County court by the auditor's agent.

It may be added that the court has been influenced somewhat by the conviction that if the copies of the reports and the desired information were obtained from the collector they would be altogether inadmissible and incompetent as evidence, and that it would be ultimately so held by the State court. While the collector was practically ordered by the State court to furnish or permit to be taken copies of the reports or else to compile therefrom the data demanded, there is no law authorizing the collector to authenticate copies of papers, nor to compile figures from them so as to make them admissible as evidence, and the State court can not impose the duty upon him. He should not be imprisoned because the head of the Department will refuse to authenticate them, and a statement by him of what the papers contain, without producing the originals or authenticated copies, would probably be mere hearsay and by no means the best evidence of their contents; and if there has been a fishing expedition merely to get information upon which to base ulterior movements by the plaintiff in suit, surely the commitment of the petitioner would then be altogether inexcusable.

To sum up the whole matter, the court has reached the conclusion:

First. That the reports are executive documents, which the United States in its sovereign capacity has acquired for the sole purpose of administering its own governmental affairs.

Second. That the officers of the National Government can not be compelled by another sovereignty to put those documents at its disposal without some express law of the United States authorizing it.

Third. That such documents are privileged and to a certain extent quasi-confidential communications, the use of which is limited to the purposes for

which they are made, unless the parties interested consent to a more extensive use. This proposition more especially applies to the reports of the storekeeper.

Fourth. That any demand for their use by any outside party must depend for success upon the courtesy of the Government and upon its notion as to the public policy of complying with the request.

Fifth. That no litigant has any right to their use in any other way or upon any other basis than such as may be fixed by the United States or under its authority.

Sixth. That the reports are property, and their ownership rests in the United States.

Seventh. That the State of Kentucky, either as a litigant or otherwise, has no right to exercise any control over them through its courts or otherwise except as the right may be given by Congressional enactment or the courtesy of the Government.

Eighth. That the Secretary of the Treasury has lawful authority to control or to make regulations for controlling that property and its custody.

Ninth. That the regulations made were within its authority and show the only way in which the courtesy of the Government respecting the matter in hand will in the absence of legislation be exercised, and the courts have no power to overrule it.

Tenth. That the State court had no lawful jurisdiction, right, or power to impose upon the collector, an officer of another sovereignty, the duty of making copies of the reports, or that of permitting others to make them, or that of compiling information from their contents.

Eleventh. That the reports were parts of the governmental archives accumulated through mere executive and administrative processes, and as such

are privileged, at least to the extent that no other sovereignty in its own interest can seize or control them for any purpose whatever without the consent of the sovereign owner lawfully manifested; and

Twelfth. That the effort to make the collector testify to their contents is virtually an attempt to compel the United States to produce them.

The proposition underlying all the others is that nobody can acquire any control over or right in this class of papers belonging to the United States in any manner, except by its authority.

These conclusions seem to be supported by—

1 Greenleaf on Evidence, sections 250 and 251.

Jones, Law of Evidence, section 780.

United States v. *Elliason*, 16 Peters, 291.

Hagood v. *Southern*, 117 U. S., 52.

Ableman v. *Booth*, 21 Howard, 506.

Cunningham v. *Macon, &c., R. R.*, 109 U. S., 451, 452.

Electoral College Case, 8 Fed. Cases, 427.

Boyd v. *United States*, 116 U. S., 616.

Black on Constitutional Law, 441.

Ex parte Reed, 100 U. S., 13.

Carr v. *United States*, 98 U. S., 433.

Virginia Coupon Cases, 114 U. S., 286.

In re Ayers, 123 U. S., 443.

And to illustrate further it may be added upon the authority of *Ex parte Roland* (104 U. S., 612), that if a mandamus should be sought in this case it would not lie, because no statute has ever made it the duty of the collector to do as required by the State.

Of course, it has not been forgotten nor overlooked that there are cases where the production of private papers in the possession of third persons not parties to the litigation can be exacted, but this

is generally where the litigant has a rightful interest in them. The rule has no application here.

1 Greenleaf on Evidence, sec. 559.

1st ed. Am. & Eng. Ency. of Law, p. 257.

Otherwise the party is left to his own resources to obtain the paper or to lay the foundation for secondary evidence of its contents. If the litigant has no right in or to the papers in the hands of the third person, nor any legal interest in them, it might possibly violate the fourth amendment of the Constitution to force the latter to produce them by an unwarrantable seizure, actual or constructive; and in another connection, so far as the distillers' reports are concerned, *Boyd* v. *United States* might again apply.

It seems to the court upon these considerations that in refusing the demand made upon him, and for which he is now in custody, the petitioner, an officer of the National Government, is discharging a duty imposed upon him by the laws of the United States and by his lawful superior officer concerning the custody of the executive papers and private property of the United States committed to his official custody; that there is no law making it his duty to do otherwise than he did, and therefore that he is in the custody of the respondent in violation of the laws of the United States and of his rights thereunder, and should be discharged therefrom.

An offer was made to prove that it had been the custom of collectors, with the consent of the distiller, to give the desired information. The court held that such testimony, being objected to, was wholly immaterial, and could in nowise affect a case where neither the collector nor the distiller consented and where the Secretary and Commissioner forbade.

The petitioner is discharged.

In conclusion, I respectfully submit to the court that if it should be placed within the power of the State courts to compel the officers of the internal revenue to produce reports, instruments, and papers in their custody in connection with the administration of the law, to be used as evidence in such courts in litigation therein pending, great inconvenience, untold confusion, and constant interference with the officers of the Government in the discharge of their official duties will be the result. If it should be held that any State court can compel the production of these reports, then every State court acting within its jurisdiction can do it. A court of a justice of the peace, within the limit of jurisdiction, would have as much power to bring the collector, deputy collector, or other officer of the internal revenue, with the papers from his office, as would the highest court in the State, and thus officers who are relied upon by the Government to discharge their duties in behalf of the Government in assessing and collecting its revenues could be taken from their official work to give attendance upon State courts and to carry with them whatever reports or other papers might be sought for use as evidence. It can be readily seen how detrimental such a condition would be to the Government and to the efficient and orderly conduct of its business.

JAS. E. BOYD,
Assistant Attorney-General.

BOSKE *v.* COMINGORE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Submitted January 8, 1900. — Decided April 9, 1900.

A United States Collector of Internal Revenue was adjudged by a court of limited jurisdiction in Kentucky to be in contempt because he refused, while giving his deposition in a case pending in the state court, to file copies of certain reports made by distillers, and which reports were in his custody as a subordinate officer of the Treasury Department. He based his refusal upon a regulation of that Department which provided: "All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose." This regulation was made by the Secretary of the Treasury under the authority conferred upon him by section 161 of the Revised Statutes of the United States, which authorized that officer, as the head of an Executive Department of the Government, "to prescribe regulations, not inconsistent with law, for the government of his department, the con luct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it." The Collector having been arrested under the order of the state authorities, sued out a writ of *habeas corpus* before the District Court of the United States for the Kentucky District. *Held:*

(1) That the case was properly brought directly from the District Court to this court as one involving the construction or application of the Constitution of the United States.

(2) As the petitioner was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the Department to which he belonged, it was proper for the District Court to consider the questions raised by the writ of *habeas corpus* and to discharge the petitioner if held in violation of the Constitution and laws of the United States.

(3) The regulation adopted by the Secretary of the Treasury was authorized by section 161 of the Revised Statutes, and that section was consistent with the Constitution of the United States. To invest the Secretary with authority to prescribe regulations not incon-

sistent with law for the conduct of the business of his Department and to provide for the custody, use and preservation of the records, papers and property appertaining to it, was a means appropriate and plainly adapted to the successful administration of the affairs of his Department; and it was competent for him to forbid his subordinates to allow the use of official papers in their custody except for the purpose of aiding the collection of the revenues of the United States.

(4) In determining whether the regulation in question was valid, the court proceeded upon the ground that it was not to be deemed invalid unless it was plainly and palpably against law.

THE case is stated in the opinion of the court.

Mr. John G. Carlisle, *Mr. Henry M. Winslow* and *Mr. William S. Taylor* for appellant.

Mr. Assistant Attorney General Boyd for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an appeal from a final order of the District Court of the United States for the District of Kentucky discharging appellee, United States Internal Revenue Collector for the Sixth Collection District in Kentucky, from the custody of the appellant as Sheriff of Kenton County in that Commonwealth.

The discharge was upon the ground that the imprisonment and detention of the appellee were in violation of the Constitution and laws of the United States. That ruling presents the only question to be considered.

Under date of April 15, 1898, the Commissioners of Internal Revenue, with the approval of the Secretary of the Treasury promulgated certain regulations for the government of collectors of internal revenue, as follows:

"All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby prohibited from giving out any special tax

records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to *subpœnas duces tecum* or otherwise. Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted. As to any other records than those relating to special-tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a state court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely: In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of the court upon the Secretary of the Treasury requesting the same. Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy."

These Treasury regulations being in force, a proceeding was

instituted in the County Court of Carroll County, Kentucky — a court of limited jurisdiction — in the name of the Commonwealth against Elias Block & Sons, for the purpose of ascertaining the amount and value of a large amount of whisky which, it was alleged, the defendants had in their bonded warehouses for a named period, but had not listed for taxation, and of enforcing the assessment and payment of state and county taxes thereon. Ky. Stat. § 4241.

In the progress of that proceeding the Commonwealth of Kentucky, represented by the Auditor's agent, took the deposition of Comingore, Collector of Internal Revenue. In answer to questions propounded to him, the Collector stated that Block & Sons, owners of a distillery, made monthly reports to his office of liquors manufactured by them and deposited in the bonded warehouses on the distillery premises from 1887 on; that the defendants made application from time to time for permission to withdraw liquors from bond; and that such reports, commencing October 1, 1885, and ending July 1, 1897, were on the files of his office, but not under his control except as Collector. He was then asked to file copies of those reports and make them part of his deposition. This he declined to do, "under section 3167 of the Revised Statutes of the United States and the rulings of the Department." That section reads: "§ 3167. If any collector or deputy collector, or any inspector or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine of not exceeding one thousand dollars, or to be imprisoned for not exceeding one year, or to both, at the discretion of the court, and shall be dismissed from office, and be forever thereafter incapable of holding any office under the Government." Being asked what rulings of the Department he referred to other than section 3167 of the Revised Statutes, he said: "The Department does not permit the giving out of anything contained in internal revenue returns or documents by a collector, storekeeper or any other officer of a collection district

for purposes other than those which the statutes of the United States contemplate." That ruling he said was made by the Secretary of the Treasury through the Commissioner of Internal Revenue.

In consequence of the refusal of the collector to file and make part of his deposition copies of the above reports of the defendants, the notary public before whom his deposition was taken adjudged him to be in contempt and ordered him to pay to the Commonwealth a fine of five dollars and to be confined in the county jail for six hours or until he was willing to furnish the copies called for or permit access to the records of his office in order that information might be obtained to be used as evidence in the above case.

The matter having been reported by the notary public to the Carroll County Court, as required by section 538 of the Kentucky Civil Code of Practice, that court made the following order:

"It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the Collector of Internal Revenue for the Sixth District of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 14th day of September, 1889, 1890, 1891, 1893, 1894, 1895, 1896 and on the 15th day of November, 1892; it is further ordered that the witness, D. N. Comingore, make or cause to be made or permit the plaintiff, its agent or attorneys, to make true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as Collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agents or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and

for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Kentucky. It is further adjudged that the action of the notary public, Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents and exemplifications or to testify as to their contents, as requested, be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of five dollars as a fine, and that he be taken by the sheriff of Kenton County, Kentucky, and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows: Please file official copies of the reports made to your office by Block & Son as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond. Also with the following request: Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll County on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, 1894, 1895 and 1896."

This action of the County Court having been brought to the attention of the Collector, he still refused to give the copies called for or to allow access to or inspection of the records of his office for the purposes indicated by the questions propounded to him. He was thereupon again held by the notary public to be in contempt, and, the petition states, that officer adjudged that "the Commonwealth of Kentucky recover of your petitioner the sum of five dollars as a fine, and that he be taken by the sheriff or some constable of Kenton County and confined in the jail of said county for the space of six hours or until he shall signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as Collec-

tor of Internal Revenue of the United States for the Sixth District of Kentucky or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of *The Commonwealth of Kentucky* v. *Block et al.*, in said county court," etc.

Having been taken into custody by the Sheriff under this order, the Collector sued out a writ of *habeas corpus* and was discharged from custody by the order of the United States District Court for the Kentucky District.

1. In the brief of the Assistant Attorney General some doubt is expressed whether we can take cognizance of this case upon appeal from the District Court. Prior to the passage of the act of March 3, 1891, establishing the Circuit Court of Appeals, an appeal from the final judgment of a District Court on an application for a writ of *habeas corpus* by or on behalf of one alleged to be restrained of his liberty in violation of the Constitution or any law of the United States went first to the Circuit Court. Rev. Stat. § 763. But by the above act of 1891 it was provided that appeals or writs of error may be taken from the District Courts or from the Circuit Courts direct to this court in certain cases, among others, "in any case that involves the construction or application of the Constitution of the United States." 26 Stat. 826, 828, c. 517, § 5. The present case belongs to that class. The appellee, who was discharged upon *habeas corpus*, invoked the protection of the Constitution against his being restrained of his liberty by the appellant acting under an order of commitment issued by an inferior state court; and the judgment of the District Court proceeded upon the ground that the proceedings against him were inconsistent with the laws of the United States and with the regulations of the Treasury Department legally prescribed under those laws. Throughout, the contention of the appellant has been that the Constitution forbade the giving of the force of law to those regulations adopted by merely executive officers. We think the case is properly here on appeal as one involving the construction and application of the Constitution of the United States.

2. Of the power of the District Court to discharge the appel-

lee if he was held in custody in violation of the Constitution of the United States, no doubt can be entertained. It is true that in *Ex parte Royall*, 117 U. S. 241, 251, it was said that although a court of the United States had power to discharge one held in custody by state authorities in violation of the Constitution of the United States, it was not bound to interpose immediately upon application being made for the writ, but should exercise the discretion with which it was invested "in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." Hence, the general rule that the courts of the United States should not interfere by *habeas corpus* with the custody by state authorities of one claiming to be held in violation of the Constitution or laws of the United States, until after final action by the state courts in the case in which such custody exists. *Ex parte Royall*, above cited; *New York* v. *Eno*, 155 U. S. 89, and authorities there cited; *Whitten* v. *Tomlinson*, 160 U. S. 231, and authorities there cited. But to this general rule there are exceptions which are thus indicated in *Ex parte Royall*: "When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority."

The present case was one of urgency, in that the appellee was

an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the Department to which he belonged. The District Court therefore did not err in determining the question of constitutional law raised by the application for a writ of *habeas corpus*, and rendering final judgment.

3. We come then to inquire whether the imprisonment of the appellee was in violation of the Constitution or laws of the United States. This question was fully examined in the elaborate and able opinion of Judge Evans of the District Court. 96 Fed. Rep. 552.

The commitment of the appellee was because of a refusal to file with his deposition copies of certain reports made to him by Block & Sons, distillers, of liquors manufactured by them and deposited in the bonded warehouses on the distillery premises during a specified period. Manifestly, he could not have filed the copies called for without violating regulations formally promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. If these regulations were such as the Secretary could legally prescribe, then, it must be conceded, the state authorities were without jurisdiction to compel the Collector to violate them.

The Commissioner of Internal Revenue is an officer in the Department of the Treasury. Rev. Stat. § 319. And the Secretary of the Treasury, as the head of an Executive Department of the Government, was authorized "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it." Rev. Stat. § 161.

Now, the reports or copies of reports in the possession of the Collector—for not producing copies of which he was adjudged to be imprisoned—were records and papers appertaining to the business of the Treasury Department and belonging to the United States. The Secretary was authorized by statute to

make regulations, not inconsistent with law, for the custody, use and preservation of such records, papers and property. The Constitution gives Congress power to make all laws necessary and proper for carrying into execution the powers vested by that instrument in the Government of the United States or in any Department or officer thereof. Const. Art. 1, § 8. That power was exerted by Congress when it authorized the Secretary of the Treasury to provide by regulations not inconsistent with law for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it. The regulations in question may not have been absolutely or indispensably necessary to accomplish the objects indicated by the statute. But that is not the test to be applied when we are determining whether an act of Congress transcends the powers conferred upon it by the Constitution. Congress has a large discretion as to the means to be employed in the execution of a power conferred upon it, and is not restricted to "those alone without which the power would be nugatory;" for, "all means which are appropriate, which are plainly adapted" to the end authorized to be attained, "which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415, 421, 423. In the more recent case of *Logan* v. *United States*, 144 U. S. 263, 283, 293, this court, referring to the above constitutional provision, said that "in the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution." Again: "Every right created by, arising under or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in

the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

Can it be said that to invest the Secretary of the Treasury with authority to prescribe regulations not inconsistent with law for the conduct of the business of his Department, and to provide for the custody, use and preservation of the records, papers and property appertaining to it, was not a means appropriate and plainly adapted to the successful administration of the affairs of that Department? Manifestly not. The bare statement of the proposition suggests this conclusion, and extended argument to support it is unnecessary.

This brings us to the question whether it was inconsistent with law for the Secretary to adopt a regulation declaring that all records in the offices of collectors of internal revenue, or any of their deputies, are in their custody and control "for purposes relating to the collection of the revenues of the United States only," and that collectors "have no control of them, and no discretion with regard to permitting the use of them for any other purpose."

There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law, unless it be that the records and papers in the office of a collector of internal revenue are at all times open of right to inspection and examination by the public, despite the wishes of the Department. That cannot be admitted. The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue

laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded. Besides, great confusion might arise in the business of the Department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates. At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress. In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

In our opinion the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.

The judgment of the District Court is

Affirmed.